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EDITOR'S NOTE

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(SHOW) PROCEEDINGS AND ORDERS DATE: 110785

CASE NBR 84-1-01955 CFX
SHORT TITLE Pernsley, Irene, et al. DOCKETED: Jun 17 1985
VERSUS Harris, Martin, et al.

Date	Proceedings and Orders
Jun 17 1985	Petition for writ of certiorari filed.
Jul 10 1985	Order extending time to file response to petition until August 16, 1985.
Aug 16 1985	Brief of respondents Martin Harris, et al. in opposition filed.
Aug 16 1985	Motion of respondents for leave to proceed in forma pauperis filed.
Aug 21 1985	DISTRIBUTED. September 30, 1985
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985
Nov 4 1985	Motion of respondents for leave to proceed in forma pauperis GRANTED.
Nov 4 1985	Petition DENIED. Justice Rehnquist and Justice O'Connor would grant certiorari. Dissenting opinion by the Chief

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 110785

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Nov 4 1985	Petition DENIED. Justice Rehnquist and Justice O'Connor would grant certiorari. Dissenting opinion by the Chief Justice. (Detached opinion.)

****

1PP

PETITION FOR WRIT OF CERTIORARI

84-1958

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

IRENE PERNSLEY, et al.,
Petitioners

v.

MARTIN HARRIS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Third Circuit's refusal to apply *Younger v. Harris* abstention conflicts with this Court's decisions when the federal plaintiff class admits that they are plantiff class members in an ongoing state court proceeding challenging the conditions of confinement in the Philadelphia Prisons on both federal and state constitutional grounds and when such state court action is presently pending in the Pennsylvania Supreme Court.

LIST OF ALL PARTIES

Petitioners:
IRENE PERNSLEY
ROYAL L. SIMS
REV. ALBERT CAMPBELL
LABORA BENNETT
JAMES BARBER
MARK MENDEL
DONALD PADOVA
DAVID S. OWENS
JOHN DAUGHEN
RODNEY D. JOHNSON
HON. WILLIAM J. GREEN
CITY OF PHILADELPHIA
JAY C. WALDMAN*
RONALD J. MARKS*

Respondents:
MARTIN HARRIS
A/K/A ARTHUR CARMICHAEL
ALBERT ANTHONY
ORLANDO X. MC CREA
ANDRE MOORE
FRANK L. HANSFORD, JR.
TYRONE GLENN
CARLOS ROYSTER
AMIN ABDULLAH
KHALID ALLAH MUHAMMAD
ARNOLD FURTICK

*Co-Defendants Waldman and Marks shall be requesting Certiorari by a separate petition.

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TABLE OF AUTHORITIES

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITATIONS TO OPINIONS BELOW

The District Court for the Eastern District of Pennsylvania issued an unreported Memorandum and Order on December 30, 1983 which is included in the Appendix at page A-1. This order was appealed by Respondents and was reversed by the Court of Appeals for the Third Circuit in an Opinion filed on February 22, 1985 which is included in the Appendix at page A-17. Petitioners requested Rehearing and the Court of Appeals for the Third Circuit denied Sur Petition for Rehearing in an Opinion filed on March 21, 1985 which is included in the Appendix at page A-47.

JURISDICTION

The judgment order of the Court of Appeals for the Third Circuit was entered on February 22, 1985 and the order denying Petition for Rehearing was entered on March 21, 1985. This Petition for a Writ of Certiorari was filed within 90 days of the date of entry of the denial of rehearing by the Court of Appeals.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §1331 and jurisdiction in the Third Circuit on 28 U.S.C. §1291.

STATEMENT OF THE CASE

Plaintiffs in this action are asking a federal district court to duplicate on-going state court regulation of the Philadelphia prison system. Despite the existence of state court proceedings in *Jackson v. Hendrick*, an action in which the federal plaintiff Harris admits he is a class member, Harris has asked the federal courts to undertake reform of the conditions of confinement in the Philadelphia prisons. On behalf of the same class represented in *Jackson* and all persons confined in the Philadelphia prisons, he has asserted that overcrowded conditions of confinement violate the Eighth Amendment of the United States Constitution. The complaint seeks extensive injunctive relief and monetary damages for the individual inmates.

Exactly the same claims are presently before the Pennsylvania courts in *Jackson v. Hendrick*.[1] *Jackson* is also a class action on behalf of all inmates in the Philadelphia prisons and the issue is whether the same Philadelphia facilities are unconstitutionally overcrowded under federal and state constitutional provisions. The

1. There is no claim for damages presently pending in *Jackson v. Hendrick*, but there is also no bar to the assertion of such a claim, and indeed, requests for fines and damages have been made in the recent past in *Jackson*.

City officials charged with administering the Philadelphia prison system are defendants in both *Harris* and *Jackson*.

In the fourteen year history of the *Jackson* case, the state court has issued numerous remedial orders regarding prison conditions. The three-judge trial court has ordered construction of new facilities which is presently on-going. The state court continues to monitor renovation construction and other prison conditions through court hearings and reports by Petitioners and through a prison master appointed by that court. The precise issue of whether Pennsylvania law and constitutional precepts require a "one-man, one-cell rule" is currently before the Pennsylvania Supreme Court which has assumed extraordinary plenary jurisdiction over the entire *Jackson* case.

Despite the pendency of *Jackson*, in which the federal plaintiffs admit they are class members, they would have the federal court undertake to duplicate this state court regulation of the Philadelphia prisons.

The district court, recognizing the existence of a substantial and ongoing state court proceeding involving an important state interest, chose to abstain. *Harris v. Pernsley*, No. 82-1847, slip op. (E.D. Pa., December 30, 1983).

The Court of Appeals for the Third Circuit reversed the District Court's decision. In a single paragraph, the majority discussed and dismissed the Petitioners' contention that the principles of abstention articulated in *Younger v. Harris*, 401 U.S. 37 (1971) apply to the instant matter. The court held that *Younger* did not apply because:

> '[T]here are no state criminal proceedings or nuisance proceedings antecedent to a criminal proceeding involved here'. . . [and]
>
> '[W]here the pending state proceeding is a privately-initiated one, the state's interest in that proceeding is

> not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts'. [citations omitted.]

Harris v. Pernsley, No. 84-1039, slip op. at 13 (3d Cir., February 22, 1985). Judge Garth filed a forceful dissent.

Petitioners filed a Petition for Rehearing which was denied by a sharply divided court. Judges Adams, Hunter, Weis, Garth and Becker dissented from the denial. Judge Garth once again filed a dissenting opinion, and Judge Adams dissented from the denial because, "[T]his case raises important questions regarding the scope of the *Younger* abstention doctrine, and because it appears that the state court proceedings involving the Philadelphia County prison system are being conducted in good faith and with due haste." *Harris v. Pernsley*, Sur Petition for Rehearing, No. 84-1039, slip op. at 2 (3d Cir., March 21, 1985).

The Third Circuit's application of the *Younger* doctrine ignores the teachings of this Court. It fails to even discuss a decade of Supreme Court precedent regarding *Younger*. Instead, the majority opinion summarily concludes that *Younger* applies only if the state proceeding is criminal or quasi-criminal and only if that proceeding is not privately initiated.

Petitioners contend that the Court of Appeals for the Third Circuit erred in failing to find the *Younger* abstention doctrine applicable to this case and that its opinion is contrary to the decisions of this Court.

ARGUMENT

In refusing to abstain from exercising jurisdiction, the Court of Appeals for the Third Circuit ignores this Court's precedent and sanctions an outdated and narrow reading of *Younger v. Harris*, 401 U.S. 37 (1971). In disposing of the *Younger* doctrine, the Circuit Court stated:

> The [trial] court also considered whether it should decline to exercise jurisdiction on the ground that it would be called on to restrain the enforcement of a state court proceeding in which the state had a significant law enforcement interest. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris* , 401 U.S. 37 (1971). Noting that "[t]here are no state criminal proceedings or nuisance proceedings antecedent to a criminal proceeding involved here," App. 15, it declined to dismiss on the authority of *Younger v. Harris*. The trial court's holding in this respect complies with the consistent holdings of this court that "where the pending state proceeding is a privately-initiated one, the state's interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts." [citations omitted] Since the municipal and state officials are defendants in the state proceeding resisting the enforcement of federal constitutional rights, rather than plaintiffs or prosecutors seeking vindication of state law enforcement policies, the trial court did not err in declining to dismiss on the authority of *Younger v. Harris* and its progeny.

Harris v. Pernsley, No. 84-1039, slip op. at 12-13 (3d Cir., February 22, 1985)

The above interpretation is contrary to the emerging principles enunciated by this Court. The circuit court majority's decision rests on two incorrect propositions: that *Younger* is applicable only when there are pending state criminal or quasi-criminal proceedings and that *Younger* is applicable only when the state proceeding is not privately initiated.

I. The Younger Doctrine Of Abstention Applies To Ongoing Civil State Court Proceedings If The Subject Matter Involves An Important State Interest.

While this Court initially applied the *Younger* doctrine of abstention to allow a federal court to abstain when there was a pending state criminal proceeding, this Court has enlarged its meaning and application far beyond the realm of criminal or quasi-criminal proceedings. "The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), citing *Moore v. Sims*, 442 U.S. 415, 423 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-605 (1975). In the present case, the continuing state court proceedings deal with an important state interest — the administration of a county prison system. These proceedings, while not criminal or quasi-criminal in nature, fit well within the boundaries of the expanded *Younger* doctrine.

Since *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), this Court has found repeatedly that the linchpin of the *Younger* doctrine lies in the concept of "comity," and in the instant case, "comity" demands federal court abstention. Here, the state court has issued numerous and recent remedial orders requiring Petitioners to take extraordinary measures to alleviate prison overcrowding. The trial court continues to actively supervise the remedial process and the operation of all the Philadelphia Prisons. As Judge Garth stated in dissent:

> Thus, not only have the lower state courts in Pennsylvania been actively engaged in controlling and supervising the prison population and prison conditions of the Philadelphia County prisons, but it now appears that effective November 21, 1984, the Pennsylvania Supreme Court itself has taken over all proceedings filed in such actions. More importantly,

> the Pennsylvania Supreme Court has directed compliance with court orders concerning: (1) construction of new facilities, (2) population caps, (3) release of prisoners, and (4) conditions of confinement including double and triple celling.
>
> These are the very issues involved in the federal proceeding before us and . . . unless . . . abstention is ordered, the overall state court review of the Philadelphia County prisons will be subject to conflicting and contrary determinations respecting each of these vital state concerns. Accordingly, as a matter of federal court policy, I suggest that the panel majority has erred in its failure to acknowledge considerations of comity due the Commonwealth.

Harris v. Pernsley, Sur Petition for Rehearing, No. 84-1039, slip op. at 4-5 (3d Cir., March 21, 1985).

In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), this Court extended *Younger* abstention to a state court proceeding on an Ohio civil nuisance statute:

> [C]onsiderations of federalism . . . counsel . . . heavily toward federal restraint, since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.' [citation omitted]
>
> The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding.

Id. at 604.

Juidice v. Vail, 430 U.S. 327 (1977) and *Trainor v. Hernandez*, 431 U.S. 434 (1977) broadened further the expansion of the *Younger* doctrine. *Juidice* was an appeal by New York state court judges of a federal district court order enjoining the continued operation of New York's statutory civil contempt proceedings. The state court action was initiated by a private party. In reversing the district court's order, this Court applied *Younger* despite the presence of a privately initiated state suit:

> We now hold . . . that the principles of *Younger* and *Huffman* are not confined solely to the types of state actions which were sought to be enjoined in those cases. . . [T]he 'more vital consideration' behind the *Younger* doctrine of nonintervention lay not in the fact that a state criminal process was involved but rather in 'the notion of comity.' [citations omitted]

Id. at 334. *Trainor* involved a state court civil action brought to recover welfare payments that allegedly had been fraudulently obtained. The state court issued a writ of attachment against the appellees who in turn filed a federal suit alleging that the attachment was unconstitutional. This Court characterized the state court action as involving "important state policies such as safeguarding the fiscal integrity of [welfare] programs," and held that "the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action . . ." *Id.* at 444.

Moore v. Sims, 442 U.S. 415 (1979) similarly broadened the application of *Younger* abstention to a child abuse proceeding, initiated in state court, the result of which was to transfer temporary legal custody of several minors to the Texas Department of Human Services. The parents of the minor children, with state court proceedings pending, filed a federal court action alleging

that the Texas Family Code "unconstitutionally infringe[d] upon family integrity." *Id.* at 419. This Court found abstention appropriate:

> The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. *Samuels v. Mackell*, 401 U.S. 66, 69, 27 L.Ed 2d 688, 91 S. Ct. 764 (1971). That policy was first articulated with reference to state criminal proceedings, but as we recognized in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed 2d 482, 95 S. Ct. 1200 (1975), the basic concern — that threat to our federal system posed by displacement of state courts by those of the National Government — is also fully applicable to civil proceedings in which important state interests are involved.

Id. at 423.

This Court's most recent pronouncement regarding the parameters of the *Younger* abstention doctrine was prompted by the Third Circuit's refusal to apply *Younger* abstention principles to a state bar disciplinary proceeding.[2] *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). In *Middlesex County*, this Court unequivocally stated its sentiment regarding the purpose of the *Younger* doctrine:

> *Younger v. Harris* . . . and its progeny espouse a strong federal-policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying *Younger* abstention have been frequently reiter-

2. The Circuit Court held *Younger* inapplicable because it concluded that there was no opportunity to raise federal claims in the state forum.

> ated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways," quoting *Younger v. Harris*, 401 U.S. at 44.

Id at 431. While once again emphasizing that abstention is no longer restrained by the notion that state criminal proceedings are somehow more sacrosanct than other judicial proceedings, this Court articulated the following test for the application of *Younger* abstention:

> *[F]irst*,. . . [is there] an ongoing state judicial proceding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id at 432. Applying the test, this Court found *Younger* to be applicable: "The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." *Id* at 434.

Had the Court of Appeals correctly applied the *Middlesex County* test to this case, it would have found against federal intervention. First, *Jackson* irrefutably involves an "ongoing state judicial proceeding." The state trial court continues to exercise jurisdiction over the activities of the Petitioners with the use of a full-time, court-appointed Prison Master, continues to hold compliance hearings, and continues to issue remedial orders.

Initially, *Jackson* resulted in a 172 page opinion in which the trial court found the county prison conditions of confinement to be unconstitutional. *Jackson v. Hendrick*, No. 2437, slip. op. (C.P. Phila., April 7, 1972).

The three-judge state court panel retained jurisdiction over the remedial process and appointed a Prison Master to oversee the reformation of the prison system.

Numerous remedial orders and consent decrees followed. In recent years, the state court's remedial intervention has been particularly more frequent and noticeably more far-reaching:

1. On April 23, 1984, the *Jackson* court ordered an emergency release program and an expanded program of bail review hearings to expedite the release of detainees who do not pose a threat to the community. That same order required the City to construct two new prison facilities, adding more than 1000 cells in 1986 and 1987. Respondents are currently constructing a 650 cell facility and a center city criminal justice facility, including a holding facility with a capacity for at least 440 cells.

2. On June 22, 1984, the *Jackson* court imposed population caps on the existing Philadelphia prisons, effective October, 1984, to decrease the prison population from 3600 to 2700 inmates.

3. On October 11, 1984, after finding that the City was in contempt because the population exceeded the court-ordered cap, the state court fined the City in excess of $200,000 per month. In addition, the state court released approximately $300,000 in previously collected fines from the City and established a committee to distribute these funds.

The City appealed the June 22, 1984 and the October 11, 1984 Orders. On October 17, 1984, the Chief Justice of the Pennsylvania Supreme Court issued a stay of these Orders pending their appeals. On November 22, 1984, the Pennsylvania Supreme Court assumed plenary jurisdiction of the appeals at the request of the City. The Supreme Court also agreed to consider the legality of the "one man, one cell" prisoner housing rule which underlies all of the *Jackson* court's orders. Petitioner is awaiting a decision from the highest court in the state

regarding the underlying merits of the entire state court case.

Second, the state proceeding involves an important state interest. It implicates important state constitutional issues as well as federal, and it deals with a critical function of state government. As Judge Garth stated:

> I can think of no more weighty, vital or intimate state interests than the administration of a state's penological system. Indeed, the Supreme Court has given the federal courts unambiguous instructions to pay great deference to the States' weighty interest in administering their own prison systems. . .

Harris v. Pernsley, No. 84-1039, slip op. at 22-23 (3d Cir., February 22, 1985). Judge Garth went on to note:

> I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been, and presently are, exercising supervision over these institutions and are doing so in accordance with state and federal constitutional requirements.

The pleadings clearly reveal that since March 15, 1976, the Court of Common Pleas has not only imposed corrective measures on the Commonwealth's prison administration, but has done so continuously through various consent decrees. As recently as June 22, 1984, additional orders have been entered by the state courts. For a federal court to step in and ignore the state's own corrective proceedings is, so far as I am concerned, as inappropriate and wrong as it is for a federal court to run state hospitals, *see Pennhurst State School and Hospital v. Halderman*, ____U.S. ____, 104 S. Ct. 908 (1984); *Youngberg v. Romeo*, 457 U.S. 307 (1982), or schools, *see Williams v. Red Bank Board of Education*, 662 F.2d 1008, (3d Cir. 1981). This is so particularly where the state court's orders have been strictly enforcing federal constitutional mandates.[3]

Id. at 18-19.

Finally, had the lower court inquired, it would have found that the Respondents have had, and continue to have, the opportunity to raise constitutional challenges in the state court as part of the *Jackson* plaintiff class. The *Jackson* record is replete with instances in which such issues were adjudicated. First, in the initial 172 page *Jackson* trial opinion, the court discussed, at length, the Respondents' contention that the conditions of confinement violated the Eighth Amendment to the United States Constitution. Second, Respondents have had the opportunity to raise federal claims at each compliance hearing, and they continue to possess the right to petition the *Jackson* court for further compliance hearings if they believe that their federal rights are being impaired in any way. Finally, the *Jackson* court has even afforded the Respondents an additional forum in which to raise such concerns: Respondents may report any transgressions to the court-appointed Prison Master. Respondents have vigourously exercised their opportunity to present federal claims in the state court proceeding

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3. In *Williams v. Red Bank Board of Education*, 662 F.2d 1008 (3d Cir. 1981), the Third Circuit held that school disciplinary proceedings embodied a weighty state interest and that the potential disruption of those proceedings warranted *Younger* abstention. In the instant case, the majority virtually ignores the precedential value of *Williams*. Instead, the opinion cites *Williams* as standing for the proposition that privately initiated state proceedings cannot involve weighty state interests. However, the majority opinion in *Williams* specifically states that the administrative proceeding was *not* privately initiated. *Id* at 1019. Therefore, as Judge Garth's dissents propose, abstention is proper, and at a minimum, the federal court action should be placed in inactive status pending resolution of the state court proceeding. Thus, the majority decision in this action contradicts its own circuit's precedent.

and as a result, the City of Philadelphia is currently constructing two new correctional facilities. As Judge Garth points out in his dissent in *Harris*:

> In the present case, the courts of Pennsylvania have been overseeing the remedies directed to particular prison conditions and have been issuing remedial orders since at least March 15, 1976. They have done so after consideration of prison conditions which were alleged to violate both federal and Pennsylvania constitutions. Thus, the Pennsylvania courts have not only been aware of, but have sought to vindicate, federal concerns. Indeed, the complaint recites that a total of $325,000 in fines has been levied by the court for failure to comply with various corrective provisions of the consent decrees which had been entered. The complaint further recites that there have been four additional consent decrees that have been approved by the Court of Common Pleas as late as December 21, 1982. Moreover, as recently as June 29, 1983 — more than one year after the present federal action was commenced — the state court entered still another order establishing a plan of prison release to relieve overcrowding. That order was followed by still additional orders entered by the state courts as late as June 22, 1984.

Harris v. Pernsley, No. 84-1039, slip op. at 24 (3d Cir., February 22, 1985).[4]

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4. Respondents also argue, and the circuit majority found persuasive, that the plaintiffs herein are asking for monetary damages for their prison confinement which the state court has never ordered. Petitioners disagree on two basis: first, Petitioners agree with Judge Garth that the request for money damages ". . . is by far the most insignificant element of the plaintiffs' charge. What the plaintiffs seek here is pure and simple equitable relief and they seek it on federal constitutional grounds. The money damages, as I read the Complaint, are incidental." *Id.* at 27. Second, as Judge Garth noted in a footnote, Respondents have continued to request monetary

Even beyond the *Middlesex* analysis, this case represents a critical application of the comity concepts integral to *Younger* abstention. Here the local authorities are faced not only with federal usurpation of a critical state interest in prison regulation but also with the very real prospect of inconsistent regulatory comments from state and federal courts. If comity has any purpose it is that active state court regulation should not be subject to review and revision by individual federal judges. The Court of Appeals decision permits such review and revision.

This Court has found *Younger* abstention applicable to pending civil proceedings.[5] The doctrine is no longer

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damages from Petitioners in the state court proceeding. The state court has entertained the consideration of such requests but have denied them. *Id.* at 28, n. 4.

5. Virtually every other Court of Appeals has correctly interpreted this Court's expansion of the *Younger* doctrine to civil proceedings. For instance, in *Blue Cross and Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296 (6th Cir. 1984) the Michigan Commissioner of Insurance ordered an insurer to cease publishing certain advertisements. The insurer appealed that order to the state court and concurrently filed a 42 U.S.C. §1983 suit in federal court. The Court of Appeals for the Sixth Circuit, in affirming the trial court's decision to abstain, stated:

> *Younger* abstention, born in a criminal context, is now "fully applicable to noncriminal judicial proceedings when important state interests are involved" [citations omitted] . . . The regulation of insurance companies clearly involves important state interests.

Id. at 299. *See United Books, Inc. v. Conte*, 739 F.2d 30 (1st Cir. 1984); *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980); *Craig v. Barney*, 678 F.2d 1200 (4th Cir. 1982); *DeSpain v. Johnston*, 731 F.2d 1171 (5th Cir. 1984); *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981); *Sekerez v. Supreme Court of Indiana*, 685 F.2d 202 (7th Cir. 1982); *Central Avenue News Inc. v. The City of Minot, North Dakota*, 651 F.2d 565 (8th Cir. 1981); *Champion International Corporation v. Brown*, 731 F.2d 1406 (9th Cir. 1984); *First National Bank and Trust Co. of Wyoming v. Lawing*, 731 F.2d 680 (10th Cir. 1984). In fact, the Third Circuit majority's decision in this action is contrary

limited by the facts of *Younger* and has emerged as the guardian of our system of federalism. The Court of Appeals for the Third Circuit failed to consider the decisions expanding the *Younger* doctrine and did not address the *Middlesex County* test. As Judge Garth stated in his dissent:

> The majority, in virtual defiance of Supreme Court teachings that federal courts should not intrude in vital state interests unless federal constitutional concerns are being violated or ignored — neither of which is the case here — has nevertheless held that a federal court is to manage Philadelphia's jails.

Harris v. Pernsley, No. 84-1039, slip op. at 17-18 (3d Cir., February 22, 1985).

II. The Third Circuit Is Incorrect In Finding That The Younger Doctrine Does Not Apply To Privately Initiated State Proceedings.

In considering whether *Younger* abstention was appropriate, the Court of Appeals presumed that, because the state action was privately initiated, *Younger* was inapplicable. *See Harris v. Pernsley*, No. 84-1039, slip op. at 12-13 (3d Cir., February 22, 1985).

In *Juidice*, this Court applied *Younger* even though that case was privately initiated. *See Moore v. Sims*, 442 U.S. 415 (1979). In addition, those circuit courts which have addressed this issue have found *Younger* abstention to be appropriate despite the existence of a privately initiated state suit. *See Gresham Park Community Organization v. Howell*, 652 F.2d 1227 (5th Cir. 1981) (abstention in favor of a private action by a store owner to prevent picketing with the following observation: "[W]e

NOTES *(Continued)*
to its own decision regarding the application of the abstention doctrine. *See Williams v. Red Bank Board of Education*, 662 F.2d 1008 (3d Cir. 1981).

find no reason for limiting *Younger* to state initiated state suits." *Id.* at 1247-48); *Kenner v. Morris*, 600 F.2d 22 (6th Cir. 1979) (abstention in favor of a divorce proceeding because such proceedings were traditionally of deep state concern and should not be invaded by federal intervention.) *Accord*, *Parker v. Turner*, 626 F.2d 1 (6th Cir. 1980).

Moreover, *Jackson* is not a simple private action. It is a class action in which the three-judge trial state court and prison master have actively supervised implementation of orders which directly address the constitutional issues raised in *Harris*. Those same constitutional issues are the basis for the claims raised in *Jackson*. Therefore, the Third Circuit's refusal to consider abstention in the presence of a private suit directly conflicts with the decisions of this Court and purposely disregards the "public" nature of the pending state court proceedings in *Jackson*.

CONCLUSION

The Third Circuit's treatment of *Younger* is in conflict with the teachings of this Court. The on-going state court proceedings involve a vital state interest — the administration of a county correctional system. Any intrusion upon those proceedings would engender conflict and offend our system of federalism. As Judge Garth noted:

> Under these circumstances, I ask the question that the majority has never sought to answer — what more, consistent with Supreme Court precedent and directives, should, or could, a federal district court do, to accomplish what is presently underway in the Philadelphia court system? . . .
>
> Indeed, in light of the current posture of the orders which have been entered by the Pennsylvania courts . . . what actions could a federal district court

judge possibly take (a) without upsetting and destroying a viable program designed by the state courts to correct the Philadelphia prison conditions and (b) without trespassing on state court directives that are presently in place and in effect.

Harris v. Pernsley, Sur Petition for Reconsideration, No. 84-1039, slip op. at 6-7 (3d Cir., March 21, 1985).

For all of the foregoing reasons, this Court should grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,
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DATED: June 14, 1985

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS a/k/a ARTHUR CARMICHAEL Prison Number 80-16203 ALBERT ANTHONY - #81-16129 ORLANDO X. McCREA - #81-14560 ANDRE MOORE - #T-3223 FRANK L. HANSFORD, JR. - #T-3219 T-3765 TYRONE GLENN - #80-11017 CARLOS ROYSTER - #81-13076 AMIN ABDULLAH - #82-00012 KHALID ALLAH MUHAMMAD - #80-08190 ARNOLD FURTICK - #80-16429 on behalf of themselves and all other persons similarly situated	:	CIVIL ACTION
v.	:	
IRENE PERNSLEY, individually and in her official capacity as Welfare Commissioner of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, JOHN DAUGHEN, individually and in his official capacity as Warden of Holmesburg Prison,	:	

RODNEY D. JOHNSON, individually and in his official capacity as Managing Director of the City of Philadelphia, HON. WILLIAM J. GREEN, individually and in his official capacity as Mayor of the City of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, and RONALD J. MARKS, individually and in his official capacity as Commissioner of the Pennsylvania Bureau of Corrections : NO. 82-1847

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. DECEMBER 30, 1983

INTRODUCTION

Plaintiffs, when inmates at Holmesburg Prison ("Holmesburg") in Philadelphia, Pennsylvania, brought this action *pro se* on behalf of a class of present and future inmates to attack the constitutionality of conditions of confinement at Holmesburg. Following the appointment of counsel, plaintiffs moved for a determination that the action could be maintained as a class action. Plaintiffs then filed an Amended Complaint adding as defendants the Commissioner of Pennsylvania Bureau of Corrections (Ronald J. Marks) and General Counsel of the Commonwealth of Pennsylvania (Jay C. Waldman): All defendants filed motions to dismiss; upon oral argument, the court gave leave to file supplemental briefs on any issue including whether Edward A. Aguilar, Esquire, the court-appointed Master in *Jackson v. Hendricks*, Court of Common Pleas of Philadelphia County, February Term, 1971, No. 2437, and/or David Rudovsky, counsel for the plaintiffs in *Jackson*, should be joined as parties in this case. Messrs. Aguilar and Rudovsky both filed statements opposing their joinder. The action will now be dismissed for reasons set forth herein.

FACTS

In February, 1971, five inmates of the Philadelphia prison system brought a class action in equity in the Court of Common Pleas of Philadelphia County, Pennsylvania, that attacked the constitutionality of their conditions of confinement and requested injunctive relief against prison and City officials, and the City of Philadelphia. On April 7, 1972, a three-judge court in a 264 page Opinion held that conditions in the Philadelphia County prisons violated the rights of inmates under, *inter alia*, the United States and Pennsylvania Constitutions; the *decree nisi* appointed a Prison Master to administer the court's corrective decree. On June 7,

1972, the decree became final; it was later affirmed by the Pennsylvania Supreme Court, *Jackson v. Hendricks*, 457 Pa. 405, 321 A.2d 603 (1974). The state court retained jurisdiction over the parties and the action and has since issued remedial orders, including an order establishing a maximum inmate capacity for the Philadelphia prison, and approved consent decrees entered into by the parties. The court issued its latest order regarding a program of early release for sentenced prisoners on September 9, 1983.

Plaintiffs contend that, notwithstanding the state court's remedial measures, unconstitutional conditions continue at Holmesburg. They bring the present action under 42 U.S.C. §1983 for deprivation, under color of state law, of rights and immunities guaranteed by the Constitution of the United States. Plaintiffs allege: that the defendants have acted or failed to act in ways that do not correct and exacerbate the unconstitutional conditions at Holmesburg; that the defendant City of Philadelphia has failed to honor the terms of various consent decrees in *Jackson* and has deprived the plaintiffs of liberty interests without due process of law; and that defendants Waldman and Marks have deprived plaintiffs of rights guaranteed by the Eighth and Fourteenth Amendments by permitting the Philadelphia County prisons to receive prisoners sentenced to terms of more than six months but less than five years notwithstanding current conditions at Holmesburg. Plaintiffs request both injunctive and monetary relief on behalf of a class of present and future inmates.

The City defendants move to dismiss on grounds of *res judicata* and comity because of the *Jackson* case. Defendants Waldman and Marks move to dismiss not only on grounds of *res judicata* and comity but also because the action is barred by the Eleventh Amendment and the complaint is lacking in specificity. Marks further asserts

that he is immune from liability for money damages and that the claims for injunctive relief on behalf of plaintiffs no longer confined at Holmesburg are moot.

RES JUDICATA

The doctrine of *res judicata* provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 467 n.6 (1982). *See also, Allen v. McCurry*, 449 U.S. 90, 94-95 (1980) (*res judicata* bars relitigation of issues that were or could have been raised in a prior action). "[R]es judicata applies to repetitious suits involving the same cause of action." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

Res judicata and collateral estoppel have developed to prevent the repetitive judicial consideration of the same issues. Under the doctrine of collateral estoppel, a final judgment on the merits in a prior suit "precludes relitigation [in a second suit] of issues actually litigated and determined, regardless of whether it was based on the same cause of action as the second suit," *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); the principle of *res judicata* bars a second suit on a cause of action if there has been final a judgment on the merits in a prior lawsuit between the same parties on their privies. *Id.* The parties are bound as to all matters, fact and law, that were or might have been adjudicated in the prior action. *Morris v. Jones*, 329 U.S 545 (1947). But *res judicata* applies only if there were an indentity of parties and indcntity of issues in the prior action.

Plaintiffs, present or recent inmates of Holmesburg prison, are members of the class certified in *Jackson*. The putative class here consists of "all persons who have been inmates of Holmesburg prison since April 30, 1980, and . . . all future inmates of Holmesburg prison." *Jack-*

son was brought on behalf of plaintiffs therein and "all others confined in Philadelphia prisons," *Jackson, supra*, 457 Pa. 405, 406, 321 A.2d 603, 604 (1974). The *Jackson* court has retained jurisdiction and continues to issue remedial orders regarding conditions in the Philadelphia prison system; its decrees apply not only to those individuals who were inmates at the time it rendered its judgment on the merits but also to all current inmates of the Philadelphia prisons.[1]

The named plaintiffs here were not named plaintiffs in *Jackson*, but they were and are members of the *Jackson* class. Plaintiffs admit in their Amended Complaint that, "the plaintiff class in *Jackson v. Hendrick* . . . includes the entire plaintiff class herein." (¶50). Members of a class as well as the named representatives are precluded from relitigating the same action, or any issues that were or could have been raised therein, in a different court on behalf of themselves, the same class as in the intitial action, or a new class. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Giordano v. Radio Corp. of America*, 183 F.2d 558 (3d Cir. 1950).

Res judicata bars this action by members of the *Jackson* class because they also raise issues which were or could have been raised in *Jackson*. *Kremer, supra* at 271 n.6. This suit arises out of alleged unconstitutional conditions in the Holmesburg prison, the subject matter of *Jackson*, and seeks the same relief as that in *Jackson*.[2]

1. The *Jackson* court asserted jurisdiction over inmates currently incarcerated in the Philadelphia prisons as recently as June 29, 1983 (ordering, among other things, the parole of those persons sentenced to a minimum of less than one year in the Philadelphia prisons as of August 1, 1983).

2. Plaintiffs do seek monetary, in addition to injunctive, relief. To that extent, the relief sought is different from the declaratory and injunctive relief sought in *Jackson*. *Res judicata* precludes plaintiffs from raising any claim which was or could have been raised in a prior case, *Kremer, supra*, at 467 n.6; Brown v. Felser, 442 U.S. 127, 131 (1979). Plaintiffs' claim for monetary damages could have been raised in the prior action so that the difference in the relief sought does not preclude the defense of *res judicata*.

See, Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 470 (3d Cir. 1950). Plaintiffs admit that the subject matter of this action and *Jackson* are identical. Memorandum of Plaintiffs in Opposition to Motions to Dismiss Amended Complaint; at 13.

However, plaintiffs contend that the unconstitutional conditions at Holmesburg constitute a continuing cause of wrongful conduct giving rise to more than one cause of action. But the *Jackson* court has retained jurisdiction to deal with continuing conditions of confinement of the present and future inmates who are members of this plaintiff class. The matters which were litigated or could have been litigated in *Jackson* cannot be relitigated here; the *Jackson* court's retention of jurisdiction over current inmates is a bar to this action.

Plaintiffs do not actually seek to relitigate the factual determinations and legal conclusions of *Jackson;* they seek the relief to which *Jackson* entitles them but which they claim has not been promptly provided. Plaintiffs in effect petition this court to enforce the *Jackson* orders and consent degrees with more deliberate speed. However, the jurisdiction of this court cannot be invoked to modify or enforce orders of a state court, especially where that court has retained jurisiction over the parties and cause of action. Plaintiffs must petition the *Jackson* court to enforce its decision or punish any contempt of its decrees.

If this were a new cause of action, a "continuing wrong," as alleged, the question whether unconstitutional conditions continue at Holmesburg would have to be litigaged. If *Jackson* has not decided the issue presented by plaintiffs, plaintiffs would be unable to rely on the *Jackson* decision as having determined liability. This court would be obligated to ascertain whether, in light of

other current authority, unconstitutional conditions now prevail at Holmesburg; it could not rely on *Jackson* as having already made that determination for this court. *See, Union County Jail Inmates, et al. v. DiBuono, et al.*, 713 F.2d 984 (3d Cir. 1983). *See also, Rhodes v. Chapman*, 452 U.S. 337 (1981) and *Bell v. Wolfish*, 441 U.S. 520 (1979). *Cf.* Memorandum of Plaintiffs in Opposition to Motion to Dismiss Amended Complaint, p.13.

Res judicata binds both parties and may be invoked by either to prevent relitigation of the same action. The doctrine of *res judicata* "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relationships." *Sunnen, supra* at 597. The rule is intended to prevent needless and duplicative litigation, conserve judicial resources and encourage reliance on adjudication by preventing inconsistent decisions. *Allen, supra* at 94. These considerations are implicated even when it is asserted by the party that did not prevail but was held liable in the prior proceeding. Therefore, *res judicata* bars plaintiffs' action against the City defendants, parties or privies to parties in the *Jackson* case.

ABSTENTION/COMITY

Because there are substantial and continuing state proceedings in this case, the exercise of federal jurisdiction would not be appropriate whether or not the decision in *Jackson* in *res judicata*. The doctrine of abstention permits a federal court in its discretion to decline or postpone the exercise of its jurisdiction. It has been limited by the Supreme Court to three general categories. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814-817 (1976).

First, "[a]bstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.' " *Id.* at 814 (citation

omitted). This is known as "*Pullman* abstention." *See, Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Second, abstention is appropriate where the exercise of federal jurisdiction would substantially interfere with state regulation of matters of significant importance to the state. *See, Buford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative*, 583 F.2d 104 (1978). Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction is sought to restrain state criminal proceedings. *See, Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971).

The present case does not fall within any of these categories. Although a federal constitutional issue is presented for decision, there is no pertinent state law which would preclude the need to decide the constitutional issue. The administration of the state prison system is a matter of significant importance to the state[3] but there are no state claims made in this case; the court action in *Jackson* was premised on federal not state constitutional rights. There are no state criminal proceedings or nuisance proceedings antecedent to a criminal proceeding involved here. Therefore, a stay or dismissal cannot be supported under any of the traditional formulations of the abstention doctrine.

However, the Supreme Court has also recognized a fourth category of cases in which federal courts may decline to exercise their jurisdiction. While not denominat-

3. This has been recognized by Congress in the Civil Rights of Institutionalized Persons Act which provides that if the Attorney General has certified that there are state administrative remedies for prisoner grievances in substantial compliance with minimal acceptable standards promulgated in accordance with the Act, the district court shall, if it believes that such a requirement would be appropriate and in the interests of justice, continue cases for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available. 42 U.S.C. §1997e(a)(1).

ing it "abstention," the Court has stated that, "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Colorado River, supra* at 817 (citation omitted). Although "the circumstances that justify dismissal of a federal suit because of the presence of a concurrent state proceeding for reasons of wise judicial administration" are limited because of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them . . ., [such] circumstances . . . do nevertheless exist." *Id.* at 817-818.

The decision whether to defer to "the concurrent jurisdiction of the state court is committed to the court's discretion. *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978); *Bullhart v. Excess Insurance Co.*, 316 U.S. 491 (1942). In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiciton, a federal court may consider such factors as the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was asserted. "[N]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Colorado River, supra* at 818-819.

In *Colorado River*, the United States brought an action in federal court for a declaration of the government's rights to Colorado River water. The United States was subsequently made a party to state court proceedings which would adjudicate all the claims brought by the government in the federal action. The district court then dismissed the case because of the pendency of the state

proceedings. The Supreme Court determined that the dismissal could not be supported under abstention doctrines formulated at that time but nevertheless affirmed dismissal for reasons of wise judicial administration in view of the pendency of the state proceedings. The Court found that the McCarran Amendment, 43 U.S.C. §666, an expression of congressional policy favoring resolution of federal water claims in state courts, counselled against the exercise of federal jurisdiction. The Court also found significant that the proceeding in the federal court was in its initial stages;[4] there was a 300-mile distance between the state and federal court; the federal action would occasion extensive involvement in state water rights; and the government had participated in similar state proceedings in previous instances.

In this case, several factors likewise counsel against exercise of jurisdiction. First, the state court, which exercised jurisdiction prior to this court, has rendered a final judgment declaring conditions in the Philadelphia prison system unconstitutional.[5] There have been no proceedings of substance in this court.[6] The constitutionality of conditions at Holmesburg would have to be relitigated if this court were to exercise jurisdiction; such action might result in a decision contrary to that rendered in *Jackson*. Interests of comity are implicated because this action would result in duplicative litigation and create the possibility of conflict with regard to defendants' legal duties. The *Jackson* court has retained jurisdiction over the parties and the cause of action and has continued to issue remedial orders. Any action by

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4. Only a complaint and motion to dismiss had been filed in the federal action. 424 U.S. at 820, and n.25.

5. The state court's remedial orders of this year reaffirm that court's determination that current conditions in the Philadelphia prison system require continuing court intervention.

6. The only actions taken have been the filing of the complaint (subsequently amended), and plaintiff's motion for class certification, the motions to dismiss, and argument thereon.

this court would necessarily conflict with the state court's ongoing remedial process, and would disregard considerations of comity and harm our federalism.

While the court is mindful of the obligation of a federal court to exercise the jurisdiciton given it, there are "exceptional circumstances" here that justify dismissal. *See, Colorado River, supra.* Plaintiffs are not left without protection by the dismissal of this suit. In view of the extensive exercise of supervisory powers by the *Jackson* court, this court cannot say that the constitutional interests of the inmates in the Philadelphia prisons, including Holmesburg have not been or will not be protected by the state courts. Acceptance of jurisdiction now, when there is an active and ongoing state remedial process implementing a final state court judgment, would not only needlessly injure federal-state relations but would result in wasteful, duplicative and piecemeal litigation. This court's exercise of jurisdiction would not be in the interests of "wise judicial administration."

Although defendants Waldman and Marks are not parties to the *Jackson* case, and the action against them was not and could not have been brought in *Jackson*, the above discussion as to abstention and comity applies equally to them. Plaintiffs claim that Waldman and Marks have exacerbated the existing unconstitutional conditions at Holmesburg by classifying Holmesburg eligible to receive persons sentenced to prison terms of not less than six months and not more than five years. Plaintiffs seek damages and injunctive relief.

The claim for damages cannot survive a motion to dismiss. The claims for damages against the state defendants in their individual capacities do not contain allegations of sufficient specificity to defeat their qualified immunity as state officials with discretionary powers. *See, Harlow v. Fitzgerald,* 457 U.S. 800, 815-819 (1981). The claim for damages against the state defendants in their official capacities is barred by the Eleventh Amendment. There is a justiciable claim for prospective injunc-

tive relief; if it were adjudicated by this court and defendants were found liable, the relief sought would conflict with the *Jackson* court's substantial and continuing corrective orders to implement its prior decree. This is not in the interests of federalism or the effective administration of justice. The case will therefore be dismissed in its entirety.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS : CIVIL ACTION
a/k/a ARTHUR CARMICHAEL :
Prison Number 80-16203 :
ALBERT ANTHONY - #81-16129 :
ORLANDO X. McCREA - #81-14560 :
ANDRE MOORE - #T-3223 :
FRANK L. HANSFORD, JR. - :
#T-3219 T-3765 :
TYRONE GLENN - #80-11017 :
CARLOS ROYSTER - #81-13076 :
AMIN ABDULLAH - #82-00012 :
KHALID ALLAH MUHAMMAD - :
#80-08190 :
ARNOLD FURTICK - #80-16429 :
on behalf of themselves and all other :
persons similarly situated :
:
v. :
:
IRENE PERNSLEY, individually and in :
her official capacity as Welfare :
Commissioner of the City :
of Philadelphia, :
ROYAL L. SIMS, REV. ALBERT :
CAMPBELL, LABORA BENNETT, :
JAMES BARBER, MARK MENDEL, :
DONALD PADOVA, each individually :
and in his or her official capacity as a :
member of the Board of Trustees of the :
Philadelphia Prison System, :
DAVID S. OWENS, individually and in :
his official capacity as Superintendent of :
the Philadelphia Prison System, :
JOHN DAUGHEN, individually and in :
his official capacity as Warden of :
Holmesburg Prison, :

RODNEY D. JOHNSON, individually :
and in his official capacity as Managing :
Director of the City of Philadelphia, :
HON. WILLIAM J. GREEN, individually :
and in his official capacity as Mayor of the :
City of Philadelphia, :
CITY OF PHILADELPHIA, :
JAY C. WALDMAN, individually and in :
his official capacity as General Counsel for :
the Commonwealth of Pennsylvania, and :
RONALD J. MARKS, individually and in : NO. 82-1847
his official capacity as Commissioner of :
the Pennsylvania Bureau of Corrections :

ORDER

AND NOW, this day of December, 1983, upon consideration of defendants' motions to dismiss and memoranda of law in support thereof, plaintiffs' memoranda of law in opposition thereto and oral argument heard thereon, and for the reasons set forth in the foregoing memorandum, it is ORDERED that:

1. Defendants' motions to dismiss are GRANTED.
2. The case having been dismissed, plaintiffs' motion for class certification is DENIED AS MOOT.

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J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1039

HARRIS, MARTIN a/k/a CARMICHAEL, ARTHUR
Prison Number 80-16203
ANTHONY, ALBERT - #81-16129,
McCREA, ORLANDO X. - #81-14560
MOORE, ANDRE - #T-3223,
HANSFORD, FRANK L., JR. - #T-3219 T-3765
GLENN, TYRONE - #80-11017,
ROYSTER, CARLOS - #81-13076
ABDULLAH, AMIN - #82-00012,
MUHAMMAD, KHALID ALLAH - #80-08190
FURTICK, ARNOLD - #80-16429
on behalf of themselves and
all other persons similarly situated
Appellants

v.

IRENE PERNSLEY, individually and in her official capacity as Welfare Commissioner of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, JOHN DAUGHEN, individually and in his official capacity as Warden of Holmesburg Prison, RODNEY D. JOHNSON, individually and in his official capacity as Managing Director of the City of Philadelphia, HON. WILLIAM J. GREEN, individually and in his official capacity as Mayor of the City of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of

Pennsylvania, and RONALD J. MARKS, individually and in his official capacity as Commissioner of the Pennsylvania Bureau of Corrections

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. CIVIL NO. 82-1847)

ARGUED SEPTEMBER 10, 1984
BEFORE: GIBBONS and GARTH, *Circuit Judges*, and TEITELBAUM, *District Judge**

(Opinion filed February 22, 1985)

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*Hon. Hubert I. Teitelbaum, Chief Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

The plaintiffs, inmates of Philadelphia's Holmesburg Prison, appeal from a judgment dismissing their amended class action complaint, which seeks injunctive relief against that institution as well as money damages for the conditions of confinement in same. The plaintiffs originally filed a *pro se* complaint which was later amended after the appointment of counsel. The trial court dismissed at the pleading stage because of the possibility of relief under the terms of a judgment rendered in a case pending in the Court of Common Pleas of Philadelphia County. We reverse.

I.

Proceedings in the Trial Court

In February of 1971 five inmates of the Philadelphia Prison System brought on behalf of themselves and others a class action in the Court of Common Pleas seeking equitable relief on federal constitutional grounds. That court found the Philadelphia Prison System to be operating in violation of the eighth amendment prohibition against cruel and unusual punishment. In August of 1973 the Commonwealth Court affirmed that holding but modified the Common Pleas Court order insofar as the earlier order required the appointment of a master to prepare a report and recommendation for the framing of a final decree. *Hendrick v. Jackson*, 10 Pa.Commw. 392, 309 A.2d 187 (1973). The Supreme Court of Pennsylvania, in July of 1974, reinstated the provision in the decree providing for the appointment of a master. *Jackson v. Hendrick*, 457 Pa. 405, 321 A.2d 603 (1974). In March of 1976 the Common Pleas Court issued its first remedial order, which, *inter alia*, established a maximum inmate capacity for the Philadelphia prisons. That limit on inmate capacity, as well as other contested features of the remedial order, was affirmed *per curiam* by the Commonwealth Court in October of 1977. *Hendrick v. Jackson*, No. 1385 C.D. 1976 (Pa. Commw. Oct. 17, 1977). The Common Pleas Court retained jurisdiction over the action. Between February 4, 1977 and June 29, 1983 the parties agreed upon a series of consent decrees dealing with various methods for alleviating the overcrowded conditions of the Philadelphia prisons. The Common Pleas class action did not seek damages, and the remedial decrees made no provision for individual relief for any inmate. The defendants in that action are officials of Philadelphia, not of the Commonwealth. On

at least one occasion those Philadelphia defendants were held in contempt, and fined, for failure to comply with various aspects of the consent decree.

In April of 1982 the plaintiffs in the instant case, none of whom were incarcerated before April 1980, filed a *pro se* complaint in federal district court seeking damages and injunctive relief for themselves and for a class consisting of all persons who have been inmates of Holmesburg since that date, and on behalf of future Holmesburg inmates. The amended complaint alleges that since April 30, 1982 members of the class have been deprived of rights guaranteed to them by the eighth and fourteenth amendments, in violation of 42 U.S.C. § 1983 (1982). The amended complaint acknowledges the provisions of the several litigated and consent decrees which have been entered by the Common Pleas Court, but alleges that those decrees have never been obeyed. Plaintiffs allege, for example, that the Common Pleas decree fixes the maximum capacity of Holmesburg at approximately 700 inmates, but that the current population exceeds 1300. Plaintiffs allege that, as a result of such overcrowding, they have been subjected to and injured by a long list of hazards and deprivations, and have been subject to physical and psychological injury from violent attacks, sexual assault, and threats of physical violence by other inmates. They allege further that each of the defendants, with full knowledge of the existence of unconstitutional conditions of confinement at Holmesburg, has acted or failed to act in such a way so as to exacerbate the overcrowding and resulting conditions at that institution. The defendants include the Philadelphia officials directly responsible for Holmesburg's operation, as well as two state officials, Jay C. Waldman, General Counsel for the Commonwealth and Ronald J. Marks, Commissioner of the Pennsylvania Bureau of Corrections. The

Commonwealth defendants are alleged to be responsible for establishing standards for county jails and prisons, and to have made decisions respecting classification of prisoners which resulted in the overcrowding at Holmesburg.

The Philadelphia and the Commonwealth defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6).[1] The trial court granted these motions. The court ruled that as against the Philadelphia defendants

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1. Defendant Marks moved to dismiss for the following reasons:

   1. Plaintiffs' Amended Complaint fails to state a claim against defendant Marks upon which relief can be granted.
   2. Plaintiffs' action against defendant Marks is barred by the eleventh amendment.
   3. The claims for injunctive relief by plaintiffs who are no longer confined to Holmesburg are moot.
   4. Plaintiffs' action is barred by principles of res judicata and collateral estoppel.
   5. Defendant Marks is immune from liability for money damages.

Defendant Waldman moved to dismiss for the following reasons:

   1. The amended complaint fails to state a claim against defendant Waldman upon which relief can be granted because of lack of specificity.
   2. The action against defendant Waldman is barred by the eleventh amendment to the United States Constitution.
   3. The action is barred by principles of res judicata and collateral estoppel.

The Philadelphia defendants also moved to dismiss, but the specific reasons relied upon do not appear in the record before us.

Grounds for dismissal other than those specified in the written motions apparently were addressed at oral argument in the trial court. The record contains no transcript of that argument. Thus we must depend on the trial court's opinion to determine what contentions were made in support of the Rule 12(b)(6) motions.

both the claims for injunctive relief and for money damages were barred by res judicata, having been merged in and therefore barred by the decrees of the Court of Common Pleas. As to the Commonwealth defendants, who were not parties to the Common Pleas action, the court ruled that all claims against them were barred both by the eleventh amendment and by qualified official immunity. Alternatively, the court ruled that because of the pendency of the state court action it should abstain from adjudicating any aspect of the case and, accordingly, dismissed it entirely.

II.

Res Judicata

As we noted above, the Common Pleas Court action did not litigate any claims for money damages. Nor did it litigate events occurring after April 30, 1982. Thus the Philadelphia defendants do not urge that the plaintiffs are collaterally estopped either factually or legally -- barred by issue preclusion -- because of any determination made by the Court of Common Pleas. *See* Restatement (Second) of Judgments § 27 (1982). Indeed, quite the opposite is the case. The present plaintiffs, who were not inmates of Holmesburg at the time of the 1972 litigation, will contend, if the case goes to trial, that the Philadelphia defendants are collaterally estopped from attempting to defend the constitutionality of conditions of confinement at Holmesburg.[2] *See* Restatement (Second) of Judgments § 27 (1982).

What the Philadelphia defendants do urge, however, is that the named plaintiffs in this action and the class members whom they represent are barred by

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2. The plaintiffs plead that they are entitled to rely upon the decree in the Common Pleas action. Amended Complaint, ¶ 50, App. 36.

res judicata -- claim preclusion -- from asserting any claim which might have been asserted in the 1971 Common Pleas case. *See* Restatement (Second) of Judgments §§ 24, 41 (1982).

When determining the judgment preclusion effect of a judgment rendered by a state court, we are referred to the law of the rendering state. 28 U.S.C. § 1738 (1982); *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S.Ct. 892 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980). But while federal courts are directed by statute to look to state law for determination of the judgment preclusive effects of state judgments, state law itself is subject to the limitations of due process. Thus there are due process limitations upon the authority of states to attempt to bind by judgment non-participants in the underlying state lawsuit. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940). The position of the Philadelphia defendants is that the 1971 Common Pleas action forever bars claims for injunctive relief and damages, not only by claimants who were inmates in 1971, but also by inmates who did not become so until more than a decade later.

We need not decide whether Pennsylvania law would violate due process should it purport to go that far in applying claim preclusion. Plainly Pennsylvania law is not so extreme.

Pennsylvania applies res judicata -- claim preclusion -- only after a final judgment on the merits. *Bearoff v. Bearoff Bros., Inc.*, 458 Pa. 494, 327 A.2d 72 (1974). Even after judgment, "[i]t is well settled that for the doctrine of res judicata to prevail there must be a concurrence of four conditions: 1) identity of issues, 2) identity of causes of action, 3) identity of persons and parties to the action, and 4) identity of the quality or capacity of the parties suing or sued." *Safeguard*

Mutual Ins. Co. v. Williams, 463 Pa. 567, 345 A.2d 664, 668 (1975). We assume arguendo, that despite the retention of jurisdiction by the Common Pleas Court, its liability determination would be treated by Pennsylvania as a final judgment on the merits. It must nevertheless satisfy the conjunctive four factor test quoted above. That test is not satisfied by the Common Pleas Court judgment.

There is no identity of causes of action between the plaintiffs in the 1971 lawsuit and this one. No member of the present class even had a cause of action, either for injunctive relief or for damages, growing out of the conditions in Holmesburg in 1971, for no such class member was subjected to those conditions. A Pennsylvania judgment is not conclusive on matters which by reason of the nature of the case could not have been adjudicated. *E.g., Folmar v. Elliot Coal Mining Co.*, 441 Pa. 592, 272 A.2d 910 (1971); *Salay v. Braun*, 427 Pa. 480, 235 A.2d 368 (1967); *Maslo Mfg. Corp. v. Proctor Elec. Co.*, 376 Pa. 553, 103 A.2d 743, *cert. denied*, 348 U.S. 822 (1954). Indeed it could not have been anticipated in 1971 that the class members now before us would ever arrive in Holmesburg. Moreover there was no time at which notice could have been given to them so as to afford current class members an opportunity to assert the claims now claimed by the Philadelphia defendants to be barred. *See Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973); Restatement (Second) of Judgments § 42(1)(a) (1981). No steps were taken in the Common Pleas Court action to impose on any party in that action the responsibility for discharging fiduciary obligations to unknown potential future inmates. Thus there is no identity of persons or parties between the present class members and the named plaintiffs in the Common Pleas Court action. The Philadelphia defendants have not referred us to any

Pennsylvania case suggesting that the Courts of the Commonwealth would apply claim preclusion, on the basis of a 1971 lawsuit, against non-parties, who could not have been notified of its pendency, so as to bar claims for injunctive relief and damages for events occurring over ten years later.

The trial court erred, therefore, in holding that res judicata -- claim preclusion -- bars the instant action against the Philadelphia defendants.

III.

Eleventh Amendment

The Commonwealth defendants, Waldman and Marks, contend that the action against them for either injunctive relief or damages is barred by the eleventh amendment. The claims asserted against them are predicated upon alleged violations of the Constitution. They are charged with individual acts taken under color of state law. No payments are sought from the Commonwealth Treasury. *Compare Edelman v. Jordan*, 415 U.S. 651 (1974). No relief is sought against them under state law. *Compare Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900 (1984). They remain subject to actions for injunctive relief, *Ex Parte Young*, 209 U.S. 123 (1908), and to actions for money damages, except to the extent that they may enjoy official immunity.

IV.

Official Immunity

Plaintiffs claim Waldman and Marks made decisions which allegedly contributed to the unconstitutional conditions at Holmesburg. Waldman and Marks are not parties to the action in the Court of Common Pleas, but, according to plaintiffs, have been responsible in part for the failure of that court to achieve compliance with its decree. The trial court

accepted their argument that the official immunity holding in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1981) barred the plaintiffs' claim for monetary relief because the complaint did "not contain allegations of sufficient specificity to defeat their qualified immunity as state officials with discretionary powers." App. 18.

The qualified immunity defense only applies, of course, to claims for money damages. The trial court correctly so assumed and relied on different grounds for dismissing the action for injunctive relief against Waldman and Marks. Initially we note that qualified immunity is an affirmative defense. There is no pleading requirement that a plaintiff must anticipate such a defense. Marks and Waldman did not move for summary judgment; thus there is no record on which to judge whether they would be able to place themselves within the doctrine of official immunity.

Judging the complaint by the standard appropriate under Rule 12(b)(6), we must assume that the plaintiffs could prove that Waldman and Marks, while knowing that the overcrowded conditions at Holmesburg had already been adjudicated to be violations of the Constitution, took steps under color of state law which increased the inmate population and aggrivated the violations. The acts complained of and the resulting consequences are set out quite specifically. A Rule 12(b)(6) dismissal of the complaint against Waldman and Marks for money damages, therefore, was an error of law.

V.

Abstention

As an alternative justification for dismissing the complaint the trial court relied on what it referred to as "[t]he doctrine of abstention [which] permits a federal court in its discretion to decline or postpone the exercise of its jurisdiction." App. 14. Identifying four

categories of cases in which federal courts may decline to exercise jurisdiction, the court held that three were inapplicable, but that the fourth did apply.

First, the trial court noted that under *R. R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) federal courts may postpone adjudication of a federal constitutional issue which may be mooted or presented in a different posture by a state court determination of a state law issue. This ground for declining to exercise jurisdiction was rejected because "there is no pertinent state law which would preclude the need to decide the constitutional issue." App. 14. The defendants point to no potentially preclusive state law issue. Thus we agree with the district court that *Pullman* abstention would have been inappropriate.

Next the court considered whether the exercise of federal court jurisdiction would substantially interfere with a state regulatory scheme dealing with matters of significant importance to the state. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Baltimore Bank for Cooperatives v. Farmers Cheese Coop.*, 583 F.2d 104, 109 (3d Cir. 1978). The only regulatory scheme to which the defendants could point was the decree imposed, on federal constitutional grounds, by the Court of Common Pleas. The Court rejected a *Burford*-type abstention, noting that "[t]he administration of the state prison system is of significant importance to the state but there are no state claims made in this case; the court action in *Jackson* was premised on federal not state constitutional rights." App. 15 (footnote omitted). No special competence is claimed for the Court of Common Pleas in the administration of decrees aimed at vindicating violations of federal constitutional rights. Thus we agree that a *Burford* dismissal would have been inappropriate.

The court also considered whether it should decline to exercise jurisdiction on the ground that it

would be called on to restrain the enforcement of a state court proceeding in which the state had a significant law enforcement interest. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971). Noting that "[t]here are no state criminal proceedings or nuisance proceedings antecedent to a criminal proceeding involved here," App. 15, it declined to dismiss on the authority of *Younger v. Harris*. The trial court's holding in this respect complies with the consistent holdings of this court that "where the pending state proceeding is a privately-initiated one, the state's interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts." *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1019 (3d Cir. 1981); *See Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir. 1978) (abstention improper in a challenge to constitutionality of tax sales of property when state action to quiet title was brought by private citizens); *New Jersey Educ. Ass'n v. Burke*, 579 F.2d 764, 767 (3d Cir. 1978) (abstention improper when private plaintiffs sued state agency in state court). Since the municipal and state officials are defendants in the state proceeding resisting the enforcement of federal constitutional rights, rather than plaintiffs or prosecutors seeking vindication of state law enforcement policies, the trial court did not err in declining to dismiss on the authority of *Younger v. Harris* and its progeny.[3]

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3. The defendants do not contend that the plaintiffs have failed to exhaust state administrative remedies for prisoner grievances which have been approved by the Attorney General pursuant to the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 2, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1977(e)(a)(1) (1982)). So far as the record discloses, Pennsylvania has not obtained approval for any such remedies.

Finally, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the trial court identified a fourth category of cases which gave it discretion to decline to exercise jurisdiction for reasons of wise judicial administration when a state court had concurrent jurisdiction over a pending action. App. 15. *See also Arizona v. San Carlos Apache Tribe of Arizona*, 103 S.Ct. 3201 (1983). The court concluded that, in the interest of wise judicial administration, all claims against all parties should be dismissed.

Before addressng the trial court's treatment of *Colorado River*, we note the context in which the ruling was made. We must take as true the allegations of the complaint that conditions in Holmesburg, in 1982, violated the eighth and fourteenth amendments. We must take as true the allegations that a decade-old decree, which put a cap on inmate population, remains unenforced. Moreover, the litigation pending in the Court of Common Pleas is not fully parallel to that brought in the district court, for no claim for money damages was asserted in the state court case. Nor will the federal court case involve parallel litigation even over liability for injunctive relief, since the liability phase of the state court case has long since been concluded. Yet, despite that liability determination, the complaint alleges that inmates placed in Holmesburg since April 30, 1982 continue to suffer injury from ongoing violations of the eighth and fourteenth amendments.

The basic rule has always been that the pendency of a state court proceeding is not a reason for a federal court to decline to exercise jurisdiction established by Congress. *McClellan v. Carland*, 217 U.S. 268, 281-82 (1910). Moreover a state court having jurisdiction over a class action may not enjoin a parallel class action in a federal court. *Donovan v. City of Dallas*, 377 U.S. 408 (1964). These holdings recognize the deference which

federal courts owe to the legislative determination by Congress that plaintiffs have been given a choice of forums. *See Meredith v. Winter Haven*, 320 U.S. 228, 236 (1943).

The Supreme Court has recognized a narrow exception to the basic rule, where it has been able to identify, in other Congressional legislation, a tempering of the policy of enforcing the plaintiff's choice of a federal forum in favor of a policy of avoiding duplicative and inconvenient litigation. In *Colorado River Conservation District v. United States*, *supra*, the Court found such a modification in the McCarren Amendment, c. 651, Title II, § 208(a)-(c), 66 Stat. 560 (1952) (codified as 43 U.S.C. § 666 (1982)), in which Congress consented to suit in state courts against the United States when the United States was asserting claims for water rights under a state water rights scheme. The Court held that, in light of the McCarren amendments, deference to a parallel state proceeding was appropriate, since such deference would a) provide a single court with exclusive jurisdiction over interdependent water rights, b) avoid piecemeal litigation, and c) provide for resort to a more convenient forum, one which had first assumed jurisdiction. Even while announcing this narrow parallel litigation exception to the basic rule, however, the Court took pains to note ". . . the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* at 817, citing *England v. Medical Examiners*, 375 U.S. 411, 415 (1964). Under *Colorado Water* a district court may dismiss only upon "a carefully considered judgment" which "[o]nly the clearest of justifications will warrant . . . ." 424 U.S. at 818-19.

> The teaching of the Colorado River case is that only "exceptional" circumstances will permit a federal court to refrain from exercising its jurisdiction for

reasons of wise judicial administration due to the presence of a concurrent state court proceeding.

17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247 (1978) p.519.

Recently the Supreme Court has reconfirmed that the parallel litigation exception to the basic rule of *McClellan v. Carland* is a narrow one requiring the clearest justification. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 103 S.Ct. 927 (1983), the Court held that a diversity action to compel arbitration should not have been dismissed in favor of a state court declaratory judgment action in which the federal plaintiff was a defendant. There was no assumption by the state court of control over a *res* or property, and no contention that the federal forum was less convenient to the litigants. *Id.* 103 S.Ct. at 939. Moreover "avoidance of piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums -- far from supporting the stay, actually counsel against it." *Id.* Addressing a factor not considered in *Colorado River*, the court held that the existence of a federal law rule of decision, which either court must apply, was a major reason for exercising federal jurisdiction. Justice Brennan wrote:

> " . . . we emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, . . . the presence of federal-law issues must always be a major consideration weighing against surrender.

103 S.Ct. at 942.

The test for application of the parallel litigation exception set forth in *Colorado River* and reiterated in *Moses H. Cone* cannot be satisfied in this instance. The cases are not truly parallel since the federal court plaintiffs seek money damages while the state court plaintiffs did not. The liability phase of the state court case is long concluded, and thus parallel litigation on liability even for injunctive relief is not an issue. Indeed the plaintiffs may be able to avoid some steps in the federal court proceeding by offensive collateral estoppel use of the state court judgment. The state court is not a more convenient forum since both courts are located in the same city, equally accessible to Holmesburg. No federal statute suggests a congressional policy tempering in any way the basic policy of affording plaintiffs a choice of forum. Finally, of special significance in light of *Moses H. Cone*, the law applied in either forum is federal law. The mere pendency of a state court injunction predicated on federal law, which according to the complaint has not produced an alleviation of ongoing violations of the constitution, is not such an exceptional circumstance as to relieve the federal courts of "the virtually unflagging obligation . . . to exercise the jurisdiction given them." 424 U.S. at 817. Thus we cannot affirm the dismissal of the complaint on the ground relied on by the trial court.

VI.

Conclusion

The judgment dismissing the complaint on the defendants' Rule 12(b)(6) motion will be reversed, and the case remanded for further proceedings.

GARTH, J. *dissenting*:

The majority, in virtual defiance of Supreme Court teachings that federal courts should not intrude in

vital state interests unless federal constitutional concerns are being violated or ignored -- neither of which is the case here -- has nevertheless held that a federal court is to manage Philadelphia's jails. It so holds despite admitted record evidence (1) that the Pennsylvania courts have been and are exercising strict supervision over Philadelphia's prison system and conditions and (2) that the Pennsylvania courts are vindicating all federal constitutional rights by appropriate state court actions.

I cannot agree with the majority that the state's interests, which are so very vital in the area of prison administration, must be subordinated to federal court determinations even while the Commonwealth is expending every effort to correct the conditions that have been challenged. I therefore dissent.

I.

My disagreement with the majority is a basic one. I do not believe that Supreme Court teachings, comity, or reason support a federal court's instrusion into a state's administration of its prison system when the state courts have been, and presently are, exercising supervision over these institutions and are doing so in accordance with both state and federal constitutional requirements.

The pleadings clearly reveal that since March 15, 1976 the Court of Common Pleas has not only imposed corrective measures on the Commonwealth's prison administration, but has done so continuously through various consent decrees. As recently as June 22, 1984, additional orders have been entered by the state courts. For a federal court to step in and ignore the state's own corrective proceedings is, so far as I am concerned, as inappropriate and wrong as it is for a federal court to run state hospitals, see *Pennhurst State School & Hospital v. Halderman*, ___ U.S. ___,

104 S. Ct. 908 (1984); *Youngberg v. Romeo*, 457 U.S. 307 (1982), or schools, see *Williams v. Red Bank Board of Education*, 662 F.2d 1008, (3d Cir. 1981). This is so particularly where the state courts have been strictly enforcing federal constitutional mandates. The majority opinion attempts to excuse and explain the federal court's role by focussing on the money damages which these plaintiffs seek. Maj. Op. typescript at 18. I suggest this is a makeweight argument that cannot govern the more important and the more sensitive issue of federal and state comity presented by the circumstances of this case.

II.

In February, 1971, five prisoners in the Philadelphia prison system brought a class action in the Court of Common Pleas in Philadelphia County, on behalf of themselves and all others confined in Philadelphia prisons, seeking injunctive relief from prison overcrowding in violation of both state and federal constitutional provisions. The Court of Common Pleas found violations of both the Pennsylvania and United States Constitutions and entered a decree which became final on June 7, 1972. This decree was upheld on appeal. *Jackson v. Hendrick*, 457 Pa. 405, 321 A.2d 603 (1974). The Court of Common Pleas retained jurisdiction over the remedial stage of the case, as it has until this day. The first remedial order was issued on March 15, 1976, establishing maximum prison population limits.

Since then, the parties have entered a series of consent decrees governing administration of the prisons and designed to alleviate the conditions found violative of the eighth amendment of the United States Constitution and Pennsylvania constitutional provisions. The most recent such remedial order prior to the district court's dismissal of the instant action

was issued on June 29, 1983, and directed a plan of prison release in order to relieve overcrowding.[1]

The plaintiffs in the instant case filed this action in the federal district court for the Eastern District of Pennsylvania on April 27, 1982, seeking relief under 42 U.S.C. § 1983 from prison conditions in the Philadelphia prison system which are alleged to violate the eighth amendment. Class certification was sought for a "class consisting of all persons who have been inmates of Holmesburg Prison since April 30, 1980, and on behalf of all future inmates of Holmesburg Prison." None of the named plaintiffs were incarcerated before April 30, 1980; thus, none of the plaintiffs were prisoners during the time the 1971 action was initiated in state court. Nevertheless, plaintiffs, in their amended complaint, allege that the entire current plaintiff class is included in the 1971 class.

The current class action alleges that conditions in the Philadelphia prison system remain in violation of the eighth amendment, primarily due to continued overcrowding and the prison system's failure to comply with the state court's remedial decrees. Damages and injunctive relief were sought against the City of Philadelphia and various City officials in charge of prison administration. Further, damages and injunctive relief were sought against state officials, Waldman and Marks, for their actions certifying the prisons as suitable for prisoners who were sentenced to maximum terms of greater than six months and less than five years.

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1. Since this appeal arises from a dismissal by the district court under Fed. R. Civ. P. 12(b)(6), only the facts pleaded up to that time are relevant to disposition of the appeal. We note, however, that the Court of Common Pleas issued remedial orders on April 3, 1984 and June 22, 1984, which are subsequent to the date of the district court's dismissal. The orders established a timetable for construction of new facilities, and provided fines in case of non-compliance.

Both the City and State defendants filed motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted these motions to dismiss on several grounds. First, as to the City defendants, it found that the plaintiff class' claims were barred by the doctrine of res judicata, their claims having been merged into the decrees of the Court of Common Pleas. Second, it held that the doctrine of *Colorado River*[2] abstention was applicable to this case, where resolution of the dispute is primarily committed to the state court. It further decided that such abstention required dismissal of this case. Third, as to the State defendants, the district court found plaintiffs' claims to be barred by both the eleventh amendment protection of state sovereign immunity and qualified official immunity.

I agree with so much of the majority opinion that holds that the prisoners' claims are not barred by res judicata. I also agree with the majority's resolution of the qualified official immunity defense asserted by defendants Marks and Waldman, and its holding that the brand of abstention announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) does not apply to this case. I part company with the majority, however, in its holding that *Younger v. Harris*, 401 U.S. 37 (1971) does not authorize abstention in this case. Accordingly, I would remand the case to the district court with instructions to abstain from proceedings with this case, while at the same time retaining jurisdiction should any federal claims remain unresolved by the state court's action.

III.

This court has recently approved a form of *Younger v. Harris* abstention that has the effect of harmonizing

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2. Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976).

both federal and state remedies. *Younger v. Harris*, 401 U.S. 37 (1971), established a principle of abstention where federal adjudication would disrupt an ongoing state criminal proceeding. In *Moore v. Sims*, 442 U.S. 415 (1979), the Supreme Court extended *Younger* abstention to purely civil proceedings, applying the doctrine to bar federal court adjudication of a child custody claim where state court custody proceedings were already in progress. Even though Sims was challenging the procedures used in the state proceedings, the Supreme Court found abstention appropriate:

> The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff . . . . that policy was first articulated with reference to state criminal proceedings, but as we recognized in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); the basic concern -- that threat to our federal system posed by displacement of state courts by those of the National Government is also fully applicable to civil proceedings in which important state interests are involved.

Id. at 423.

This court then applied *Younger* abstention to state administrative proceedings in *Williams v. Red Bank Board of Education*, 662 F.2d 1009 (3d Cir. 1981). We have required that *Younger* abstention in such civil proceedings be based on the presence of weighty state interests. *See Williams* at 1017. I can think of no more weighty, vital or intimate state interests than the administration of a state's penological system. Indeed, the Supreme Court has given the federal courts unambiguous instructions to

pay great deference to the States' weighty interest in administering their own prison systems. *See generally Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983). In light of the Supreme Court's admonitions pertaining to vital state interests, we held in *Williams*, a case which concerned school disciplinary proceedings, that:

> [O]ur analysis and our reading of *Younger* cases impress us that where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests, the district court, pursuant to *Younger*, should abstain.

662 F.2d at 1017.

Williams involved a suit brought in federal court by a school teacher seeking an injunction against further state prosecution of an administrative disciplinary proceeding, expungement of the proceeding from her record, and compensatory and punitive damages. In *Williams*, we upheld so much of the district court's order directing abstention in favor of the pending state administrative proceeding, but we vacated that aspect of its order which dismissed Williams' complaint. Instead we directed the district court to retain jurisdiction pending resolution of the state proceedings in order to provide those remedies, such as constitutional damages, which were available only in the federal action. Recognizing that Williams must seek relief in federal court which was not available to her in State proceedings, we refused to deny a federal court's duty to assume jurisdiction where jurisdiction properly existed. We also recognized, however, that the federal court would find

it difficult if not impossible to adjudicate Williams' constitutional claims until after all State proceedings had been finally completed.[3]

In the present case, the courts of Pennsylvania have been overseeing the remedies directed to particular prison conditions and have been issuing remedial orders since at least March 15, 1976. They have done so after consideration of prison conditions which were alleged to violate both federal and Pennsylvania constitutions. Thus, the Pennsylvania courts have not only been aware of, but have sought to vindicate, federal concerns. Indeed, the complaint recites that a total of $325,000 in fines has been levied by the court for failure to comply with various corrective provisions of the consent decree which had been entered. The complaint further recites that there have been four additional consent decrees that have been approved by the Court of Common Pleas as late as December 21, 1982. Moreover, as recently as June 29, 1983 -- more than one year after the present federal action was commenced -- the state court entered still another order establishing a plan of prison release to relieve overcrowding. That order was followed by still additional orders entered by the state courts as late as June 22, 1984.

I recognize that *obiter dictum* in prior decisions of this Court has indicated that *Younger* abstention would ordinarily not obtain where the state

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3. Similarly, in Scott v. Germano, 381 U.S. 407 (1965), the district court hearing the Reynolds v. Sims, 377 U.S. 533 (1964) voting reapportionment case on remand was directed to vacate its judgment and stay its proceedings in order to give pending state court proceedings an opportunity to implement its own remedial plan. See also, Halderman v. Pennhurst State School and Hospital, 673 F.2d 647, 662-671 (1983) (Garth, J. concurring) (federal judicial oversight of state remedial plan preferable to appointment of federal master), *rev'd on other grounds*, ___ U.S. ___, 104 S. Ct. 900 (1984).

proceedings were instituted by a private party rather than by the state as sovereign. See *Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir. 1978); *New Jersey Education Association v. Burke*, 579 F.2d 764, 767 (3d Cir. 1978). Indeed, *Williams* itself repeats that suggestion, and the majority in this case, relying on that *dictum*, thereby rejects *Younger* (*Williams*) abstention here.

While the statements in *Williams*, *Kelly* and *Burke* may be said to create a presumption against a sufficient state interest in the pending proceedings to invoke *Younger* abstention where the pending proceedings were privately initiated, none of those cases foreclose *Younger* abstention in a case such as this one. *Williams* did not involve privately initiated proceedings. *Kelly* found abstention inappropriate where the state was not a party to the pending proceedings. However, in the instant case, state officers and other governmental parties are actively involved in the suit. In *Burke*, the Court considered the fact that the state proceedings were privately instituted to be *but one of the many factors* mitigating the state's interest in exclusively adjudicating the claims, as weighed against the interest in a federal forum. Thus, the fact that the state did not initiate the instant proceeding is not fatal to the application of the *Williams* abstention doctrine.

Moreover, to put the issue of "private initiation" completely to rest, it must be remembered that the state proceeding was not recently instituted but has long since passed the liability determination and is presently in the enforcement stage. As I have noted, the original decree finding liability was entered June 7, 1972, nearly thirteen years ago, and has been followed since then by other decrees and orders of enforcement. Thus, the present nature of the state proceeding is one that has for all practical purposes lost any "privately

initiated" character. The Commonwealth seeks no more than to enforce in its own courts, those decrees long since entered by its own courts. Thus, to reject *Williams* abstention on the ground that it does not apply where the suit has been privately initiated, is to ignore both the jurisprudential and prudential characteristics of the present state proceedings. In the present case, I am entirely satisfied that Pennsylvania's weighty interest in adjudicating through its own courts a broad remedial program aimed at revamping the Philadelphia prison system more than makes up for the circumstance that the original litigation was instigated by prisoners: the litigation having commenced in 1971 and a liability determination having been entered in 1972.

In such a situation where the state court has exercised continuing supervision over its own orders, and has sought to accommodate federal as well as state concerns, it would be improvident for this court to intrude in the ongoing state court proceedings. By the same token, however, it must be recognized, that if, in the unlikely situation that the conditions of which the prisoners complain are not remedied by the Pennsylvania court, no barrier should exist against the prisoners' seeking relief in federal court. Thus, a retention of jurisdiction and a stay of proceedings by the federal court, in order to give the State Court a reasonable time to implement its decree before the imposition of federal remedies, is as appropriate here as we found it to be in *Williams*, *supra*.

IV.

Although the prisoners sought a judgment in federal court which would declare the conditions of confinement at Holmesburg Prison to be unconstitutional and sought to enjoin the City defendants from continuing to incarcerate them under

unconstitutional conditions, they also sought money damages, costs, and attorneys fees. They sought injunctive relief and money damages against the two state defendants, Waldman and Marks, as well, based upon their actions in certifying the Philadelphia prisons as eligible institutions to receive prisoners. The district court regarded the claims for money damages against the City defendants as barred by res judicata and *Colorado River* abstention. I agree with the majority's reasoning and holding that the district court erred in applying these doctrines to the circumstances of this case.

I disagree, however, with the majority's view that the claims for money damages counsel against abstention in this case. Although the majority piously looks at the claim for money damages and constructs a theory on which it reverses the district court based on the fact that money damages have been sought, any cursory reading of the Complaint and review of the litigational history reveals that this is by far the most insignificant element of the plaintiffs' charge. What the plaintiffs seek here is pure and simple equitable relief and they seek it on federal constitutional grounds. The money damages, as I read the Complaint, are incidental.

Until such time as there has been appropriate enforcement of the Pennsylvania court's orders, it is premature even to consider damages against officials whose activities or responsibilities have been challenged. Thus, this is not a case of parallel litigation. As the majority points out, the equitable liability has already been determined in the state court (Maj. op. typescript at 18) and it is the enforcement of this liability over which the majority now seeks to assume control.

I am not suggesting for a moment that we decline to exercise jurisdiction. I suggest only that

considerations of comity dictate that we withhold our federal hand -- while retaining jurisdiction -- until the state proceedings have concluded and it is appropriate for federal proceedings to commence, providing always that the federal claims giving rise to these proceedings have not been resolved.

Because I would hold that it is inappropriate for a federal court to intrude at this time in the state proceedings (which involve the same subject matter presented by the prisoners' complaint here, and which proceedings have been ongoing and continuous) it would be inappropriate as well for a federal court to adjudicate the merits of the prisoners' claims against the individual City defendants. If the federal court must bide its time with respect to the merits of constitutional violations which the prisoners assert, it is evident that it must also bide its time with respect to resolving claims against the individual defendants where such damage claims may well be resolved in the pending state action.[4] Thus, to this extent the situation presented here is analogous to the situation which obtained in *Williams v. Red Bank, supra*, where we said,

> [I]t is difficult to see how the federal court could adjudicate Williams' constitutional claims and

4. It is unclear from the record before us whether the prisoners' claims for money damages against the individual City defendants will be resolved in the state proceedings. Counsel for the City of Philadelphia represented at oral argument that earlier such claims have been previously brought and have been resolved by the Court of Common Pleas. If, in fact, such relief is available in the state court, the granting of such relief may very well moot out the concurrent relief sought in this action. If, however, these claims cannot be resolved in state court, resolution of these claims by the federal court at the conclusion of the state proceedings would be appropriate under Williams v. Red Bank Board of Education, 662 F.2d 1008 (3d Cir. 1981).

> attorney's fees until after all disciplinary proceedings have been finally completed. How could the damages be calculated, for example, until it is known whether Williams is to be "acquitted," discharged, or suffer a reduction in salary?

So, too, here, it would be exceedingly difficult and, in my opinion, jurisprudentially improper, for the district court to fashion relief for the alleged unconstitutional conditions of Holmesburg prison[5] until the state court has had a reasonable time to implement its remedial decrees.[6]

V.

Within recent weeks, this court has recognized the vital interests that a state has in the administration of

5. Among other claims, the prisoners charged in paragraphs 43 and 44 of their complaint that food was unsanitarily prepared and served; there was a lack of bedding, towels, and toiletries, that there was reduced or inadequate access to recreational facilities, libraries, legal materials, religious services, and telephones; that visitation rights, even of legal counsel, were impaired; and that because of overcrowding prisoners have been subjected to physical attacks, sexual assaults, and psychological injuries. The state defendants have also been charged, in paragraph 54, with having classified the Philadelphia prisons as eligible to receive prisoners notwithstandng the unconstitutional conditions alleged to exist at Holmesburg.

6. I recognize that state proceedings have continued for some years. However, the state courts have not been inattentive to the claims of the prisoners. As I observed earlier in this opinion, remedial orders have been entered both prior and subsequent to the institution of the instant action, *e.g.*, in June 1983, April 1984, and June 1984, see text supra and accompanying note 1. Moreover, the nature of the conditions complained of is such that remedies may require long term supervision. Thus, the record does not disclose either an unwillingness on the part of the state court, nor an inability on its part, to rule on or correct the subject of the prisoners' complaint.

its penal system by scheduling a case for in banc consideration where one of the significant issues concerns abstention. *Georgevich v. Strauss*, No. 84-5194 (3d Cir. Jan. 9, 1985) (order listing case in banc). *Georgevich* involves the manner in which Pennsylvania may parole its prisoners. The present case involves the administration of prisons and the remedial measures designed to bring the Philadelphia prison system in line with state and federal constitutional requirements.

I find no distinction between the importance of the comity issue presented in this case and the importance of the comity issue, which is one of the issues presented in *Georgevich*. In the present case the majority opinion requires that a federal court override a state's enforcement of its own court orders, which orders have as their objective, compliance with the federal, as well as the state, constitutions. I suggest that if *Georgevich* warrants the attention of a full court, even more so does this case.

I would vacate the judgment of the district court and remand with instructions to retain jurisdiction over the proceedings in order to resolve any federal claims remaining at the conclusion of the state action.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1039

HARRIS, MARTIN a/k/a CARMICHAEL, ARTHUR
Prison Number 8016203 et al.

Appellants

v.

IRENE PERNSLEY, individually and in her official capacity as Welfare Commissioner of the City of Philadelphia, et al.

Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges* and TEITELBAUM, *District Judge*•

The petition for rehearing filed by City Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

• Hon. Hubert I. Teitelbaum, Chief Judge, United States District Court for the Western District of Pennsylvania, on panel rehearing only.

Judges Adams, Hunter, Weis, Garth and Becker would grant the petition for rehearing.

Judge Adams dissents from the denial of the petition for rehearing in banc because he believes that this case raises important questions regarding the scope of the *Younger* abstention doctrine, and because it appears that the state court proceedings involving the Philadelphia County prison system are being conducted in good faith and with due haste.

By the Court,

JOHN J. GIBBONS

Judge

Dated: March 21, 1985

GARTH, *Circuit Judge*, dissenting from the Court's denial of the City of Philadelphia's Petition for Rehearing:

My dissent from the refusal of the majority to order *Williams v. Red Bank Board of Education*, 662 F.2d 1009 (3d Cir. 1981) abstention was grounded on the principle that Federal courts should not take over, manage and operate city or state prisons when the state courts are enforcing all constitutional -- including federal constitutional -- requirements. At the time that I dissented from the panel opinion, I wrote:

> I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been and presently are, exercising supervision over these institutions and are doing so in accordance with state and federal constitutional requirements.

The pleadings clearly reveal that since March 15, 1976, the Court of Common Pleas has not only imposed corrective measures on the Commonwealth Prison Administration, but has done so continuously through various consent decrees. As recently as June 22, 1984, additional orders have been entered by the state courts. For a federal court to step in and ignore the state's own corrective proceedings is, so far as I am concerned, as inappropriate and wrong as it is for a federal court to run state hospitals, see *Pennhurst State School and Hospital v. Halderman*, ___ U.S. ___, 104 S. Ct. 908 (1984); *Youngberg v. Romeo*, 457 U.S. 307, (1982), or schools, see *Williams v. Red Bank Board of Education*, 662 F.2d 1008, (3d Cir. 1981). This is so particularly where the state court's have been strictly enforcing federal constitutional mandates.

The Petition for Rehearing that followed the filing of our opinions in *Harris* pointed out that *Jackson v. Hendrick*, No. 71-2437, slip op., (C.P. Phila. April 7, 1972), which resulted in a consent decree, affirmed by the Pennsylvania Supreme Court, 457 Pa. 405 (1974), ". . . was originally brought as a broad challenge to conditions in the Philadelphia prisons, . . . including . . . overcrowding . . . . The case extends to every detention or prison facility within the city . . . In recent years, the *Jackson* court has focused intensely on overcrowding.

"The supervision by the *Jackson* court has been active, and has involved not only the court but also the full time work of a master appointed by the court. During 1984, the *Jackson* court has taken the following steps:

> 1. On April 23, 1984, the *Jackson* court ordered an emergency release program and an expanded program of bail review hearings to expedite the

release of detainees who do not pose a threat to the community. That same order required the city to construct new prison facilities, including an additional 1200 cells in 1986 and 1987.

2. On June 22, 1984, the *Jackson* court imposed population caps on the existing Philadelphia prisons effective October 1984 to decrease the prison population from 3600 to 2700 inmates."

City Appellees' Petition for Reconsideration in Banc.

The record before the panel of this court did not disclose the State Court's activities and orders after June, 1984. The Petition for Rehearing now reveals the following:

> On October 11, 1984, after finding that the City was in contempt because the population exceeded the court-ordered cap, the state court fined the City in excess of $200,000 per month. In addition, the state court released approximately $300,000 in previously collected fines from the City and established a committee to distribute these funds. The City appealed the June 22, 1984 and the October 11, 1984 orders. On October 17, 1984, the Chief Justice of Pennsylvania Supreme Court issued a stay of these orders pending their appeals. On November 22, 1984, the Pennsylvania Supreme Court assumed plenary jurisdiction of the appeals at the request of the City. The Supreme Court also agreed to consider the legality of the "one man, one cell" rule which underlies all of the *Jackson* court's orders."

Thus, not only have the lower state courts in Pennsylvania been actively engaged in controlling and supervising the prison population and prison conditions of the Philadelphia County prisons, but it now appears that effective November 21, 1984, the Pennsylvania Supreme Court itself has taken over all

proceedings filed in such actions. More importantly, the Pennsylvania Supreme Court has directed compliance with court orders concerning: (1) construction of new facilities, (2) population caps, (3) release of prisoners, and (4) conditions of confinement including double and triple celling.

These are the very issues involved in the federal proceeding before us and, as the Petition for Rehearing observes, unless *Williams'* abstention is ordered, the overall state court review of the Philadelphia County prisons will be subject to conflicting and contrary determinations respecting each of these vital state concerns. Accordingly, as a matter of federal court policy, I suggest that the panel majority has erred in its failure to acknowledge considerations of comity due the Commonwealth.

Moreover, as a matter of law, the majority's analysis of the *Williams* abstention doctrine, and its failure to apply *Williams* here, is just plain wrong and indefensible. Perhaps an incorrect analysis which leads to an unhappy result may be overlooked or tolerated in private litigation where the stakes and the property interests are not too high. Where, however, the result of a distorted reading of Supreme Court and Third Circuit precedents leads to the very federal intrusion into state concerns that the Supreme Court and considerations of comity have counseled against, then I suggest we have exceeded our functions by far.

In this case, the Pennsylvania state courts have been overseeing and supervising the Philadelphia County Prisons since 1972. A special master is in place. Fines and other coercive means have been employed to correct a system that, as Chief Justice Nix of the Pennsylvania Supreme Court recently held, ". . . results from the fact that past successive city administrations have avoided the inevitability of providing additional facilities through rationalization, dilatoriness and procrastination." *Jackson v.*

Hendrick, No. 180 E.D. Misc. Docket 1984 (Pa., October 17, 1984).

The attention that has been given to prison problems in Philadelphia County prisons is further evidenced by the observation of Chief Justice Nix of the Pennsylvania Supreme Court that

> . . . neither party charges this administration with tactics of such dimensions. Under the present city administration, a new facility of 650 beds is being constructed in the northeast section of Philadelphia. We are advised that the excavation stage of that project has been completed. Discussions are being had regarding the establishment of a center city holding and criminal justice center. It has also been agreed that the city is now cooperating in the bail release provisions of earlier orders. Although such efforts show a willingness to comply with the June 22 order in the future, the employment of a leisurely pace in planning and executing these intentions will no longer be tolerated."

Id. Thus in addition to a special master and constant and continuing lower court attention, the Supreme Court of Pennsylvania has now taken charge of this unfortunate situation.

Under these circumstances, I ask the question that the majority has never sought to answer -- what more, consistent with Supreme Court precedent and directives, should, or could, a federal district court do, to accomplish what is presently underway in the Philadelphia court system? The question which in my opinion this Court *in banc* should answer is: under *Williams*, *supra*, why should not the federal court bide its time until, if ever, it appears that the stringent measures and remedies prescribed by Pennsylvania to vindicate federal court rights, have either failed or are unavailing?

Indeed, in light of the current posture of the orders which have been entered by the Pennsylvania courts, I suggest that this Court *in banc* should also consider: what actions could a federal district court judge possibly take (a) without upsetting and destroying a viable program designed by the state courts to correct the Philadelphia prison conditions and (b) without trespassing on state court directives that are presently in place and in effect.

In my earlier dissenting panel opinion, I referred to the fact that this court has scheduled for a full court hearing another case which concerns abstention and comity considerations. *Georgevich v. Straus*, No. 84-5194 (3d Cir. January 9, 1985) deals with the manner in which Pennsylvania may parole its prisoners. The issue there is an important one, as is the issue here. True, the abstention issue in *Georgevich* differs from the abstention issue in this case. But in both cases comity considerations are involved and are paramount.

I wrote earlier, and I now write again, to urge in light of the recent developments brought to our attention by the Petition for Rehearing and the Pennsylvania Supreme Court's orders, that if *Georgevich* warrants the attention of the full court of the Third Circuit, then even more so does this case. Because a majority of this court has not so voted, I am obliged to dissent from the court's order which denies rehearing.

I would grant the Petition for Rehearing of the City appellee.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPPOSITION BRIEF

ORIGINAL

NO. 84-1955

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

IRENE PERNSLEY, et al.,

Petitioners

v.

MARTIN HARRIS, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a conflict with this Court's decisions is presented by a decision that a district court may not abstain from exercising jurisdiction over a proposed class action under section 1983 for money damages and injunctive relief brought by inmates of a county prison alleging the unconstitutionality of conditions of confinement, where defendants in the federal action are also defendants in a state court class action brought thirteen years earlier by other inmates and which resulted in a judgment that conditions in the county jail were in violation of the state and federal constitutions, where plaintiffs do not seek to enjoin any state court proceeding nor to restrain local officials from enforcing any state or local law, and where the federal complaint alleges that defendants have for ten years successfully defied state court remedial orders aimed at the same unconstitutional conditions of confinement.

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COUNTERSTATEMENT OF THE CASE

Petitioners, the City of Philadelphia and several of its officials (hereinafter "the Philadelphia defendants," "petitioners," or "defendants"),[1] by their Petition for Certiorari, ask this Court to review the decision of the Court of Appeals for the Third Circuit that abstention under Younger v. Harris, 401 U.S. 37 (1971), does not require dismissal of an action attacking conditions in a Philadelphia county jail where the federal defendants are also defendants in a long-pending state court action involving the same jail and have stymied for more than a decade efforts to remedy the jail's unconstitutional conditions of confinement. This Court has previously denied certiorari review of the issue framed in a case in which the court of appeals had held, like the court below here, that a district court may not dismiss a civil rights claim on the basis

1. Petitioners are defendants in Harris, et al. v. Pernsley, et al., C.A. No. 82-1847 (E.D. Pa., amended complaint filed, April 19, 1983), and include the Welfare Commissioner of the City of Philadelphia, members of the Board of Directors of the Philadelphia prison system, the Superintendent of the Philadelphia prison system, the Warden of Holmesburg Prison, the Managing Director and Mayor of the City of Philadelphia, and the City of Philadelphia itself. The Commissioner of the Pennsylvania Bureau of Corrections and the General Counsel for the Commonwealth of Pennsylvania are also defendants in the Harris action, but have not petitioned for writ of certiorari. (A copy of the Amended Complaint in Harris is provided in the Appendix to this brief.)

of a state proceeding in which the federal defendants are simply opposing the implementation of federal constitutional rights and are not enforcing state law or policy.

Respondents (hereinafter "the Harris plaintiffs" or "plaintiffs")[2] brought this action in 1982 against two state and several local officials and the City of Philadelphia seeking monetary and equitable relief from the unconstitutional overcrowding and other oppressive conditions of confinement at Holmesburg Prison, one of three Philadelphia county jails. Respondents' Amended Complaint averred in essence that conditions in 1982 remained essentially unchanged from what they were in 1972 when a Pennsylvania state court first declared that Holmesburg inmates were being subjected to cruel and unusual punishment and began issuing a series of remedial orders which defendants disobeyed and which the state court was unwilling or unable to effectuate. Specifically, the Amended Complaint alleged that in 1971, inmates at Holmesburg and two other correctional institutions had commenced an action in state court challenging the conditions of confinement at the three county

2. The Harris plaintiffs are identified in the caption of the Amended Complaint. (See Appendix.)

jails.[3] After extensive testimony, a three-judge state court determined, based on the "totality of circumstances" test, that conditions in all three jails, including Holmesburg, subjected inmates to cruel and unusual punishment. That determination was affirmed by the Pennsylvania Supreme Court in 1974. Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (1974).

In 1976 -- five years after the state litigation was begun -- the trial court in Jackson issued its first remedial decree which established, inter alia, a maximum inmate capacity for the Philadelphia prisons, a provision which, along with the other contested aspects of the decree, was affirmed by the Pennsylvania Commonwealth Court. Hendrick v. Jackson, No. 1385 C.D. 1976 (Pa. Commw. Ct. Oct. 17, 1977) (per curiam). Amended Complaint ¶33. In addition, the Jackson parties entered into a series of consent decrees which are now five in number and are appended as exhibits to the Amended Complaint. See Amended Complaint Exhs. A-E. In Stipulation and Agreement I, executed on February 4, 1977, the defendants agreed to implement substantially the maximum capacity figures established by the

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3. The relevant facts regarding this prior litigation, entitled Jackson v. Hendrick, are set forth in the court of appeals decision at A-20-21. (References to the opinions of the courts below are to the Appendix following petitioners' brief.)

court in its first remedial decree. In pertinent part, Paragraph 7 provided that:

> The defendants shall set a maximum capacity for each of the three institutions for the purpose of maintaining the population at no greater than the rated level. For ... Holmesburg, the capacity shall not exceed the number of usable cells.

Amended Complaint ¶¶34-35.

The problem of overcrowding was also the subject, in part, of Stipulation and Agreement III of May 12, 1980, which provided in pertinent part that:

> 47. Defendants shall develop, effective immediately, administrative measures to maintain the population in the three institutions at no greater than the rated levels.
>
> 48. If the population exceeds this level, the Court will consider for release the following classes of inmates:
>
> (a) persons held for trial on misdemeanor offenses;
>
> (b) persons held in default of $3,000 bail or less;
>
> (c) those persons not included in sub-paragraphs (a) and (b), but who if released would not impose undue danger to the safety of the community or undue risk of non-appearance at scheduled court hearings.

Amended Complaint Exh. C.[4]

Notwithstanding the series of remedial decrees and stipulations in Jackson aimed at alleviating the conditions determined to be unconstitutional as long ago as 1972, the inmates at Holmesburg, according to the averments of the Amended Complaint, continue to experience those precise conditions. Although the maximum capacity of Holmesburg under current court order is approximately 700, the inmate population has substantially exceeded that number during the time relevant to this litigation and is currently believed to be approximately 1,300, i.e., almost twice the number that may lawfully be incarcerated there. Amended Complaint ¶41.[5] Despite twelve

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4. The problem of overcrowding was a major issue as well at a hearing before the lower court in Jackson in October 1980. Following the hearing, the court issued an order which, as modified, established a maximum capacity of 2,190 at the three Philadelphia prisons; prohibited triple celling; prohibited double celling after August 1, 1981; and established procedures for the release of inmates held on bail until the prison population was reduced to the rated capacity. The court's orders, dismissing exceptions by the City of Philadelphia and other defendants, were affirmed by the Commonwealth Court on February 14, 1983. Jackson v. Hendrick, 72 Pa. Commw. 63, 456 A.2d 229 (1983).

5. Owing in large measure to the problem of overcrowding, plaintiffs have suffered and continue to suffer, inter alia, from inadequate screening of violent and chronic offenders; unsanitary preparation and service of food; other hygienic inadequacies such as insufficient bedding, towels, and toiletries; and inadequate access to recreational facilities, work assignments, education programs, library facilities, legal materials, religious
(CONTINUED)

years of litigation in Jackson, the overcrowding and deprivations resulting from it have either persisted without material change or worsened. Amended Complaint ¶45.[6]

In 1982, the Harris plaintiffs commenced the instant action pro se seeking monetary damages resulting from the deprivation of their constitutional rights, and an injunction preventing the Philadelphia defendants from continuing to violate their rights by placing them in conditions of confinement already determined to be unconstitutional. Defendants moved to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(6). Despite the fact that the Harris plaintiffs' claims did not arise until 1980, a full six years after the Pennsylvania Supreme Court affirmed the lower court decision finding the Philadelphia prisons unconstitutional, the district court dismissed the action based on res judicata and the variant of the abstention doctrine set forth in Colorado River Water Conservation District v. United

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services, and telephones. Amended Complaint ¶43. Moreover, as a direct result of the overcrowding, plaintiffs have been subjected to physical and psychological injury from violent attacks, sexual assaults, and threats of physical violence by other inmates. Amended Complaint ¶44.

6. "The present problem results from the fact that past successive city administrations have avoided the inevitability of providing additional facilities through rationalization, dilatoriness and procrastination." Jackson v. Hendrick, No. 180 E.D. Misc. Docket, 1984, slip op. at 4 (Pa., filed October 17, 1984.)

States, 424 U.S. 800 (1976). The district court specifically refused to dismiss on the basis of Younger.

The Court of Appeals for the Third Circuit reversed the district court's decision. The court of appeals determined that the Harris plaintiffs could not have been parties to the Jackson proceedings, nor could they have raised in those proceedings the claims at issue here. (A-25.) Hence, the action was not barred by res judicata. (A-26.) Moreover, the court of appeals held that abstention under Colorado River was not warranted because the test for application of the parallel litigation exception to this Court's decision in McClellan v. Carland, 217 U.S. 268 (1910), was not satisfied:

> The [state and federal] cases are not truly parallel since the federal court plaintiffs seek money damages while the state court plaintiffs did not. The liability phase of the state court case is long concluded, and thus parallel litigation on liability even for injunctive relief is not an issue.

(A-33.) On the other hand, the court of appeals agreed with the district court that other forms of abstention, particularly Younger abstention, did not apply:

> Since the municipal and state officials are defendants in the state proceeding resisting the enforcement of federal constitutional rights, rather than plaintiffs or prosecutors seeking vindication of state law enforcement policies, the trial court did not err in

> declining to dismiss on the authority of Younger v. Harris and its progeny.

(A-29.) (footnote omitted).

As defendants' motion to dismiss focused mainly on res judicata, and as the district court rejected the applicability of Younger abstention, the issue of Younger abstention was not briefed extensively below nor dicusssed at length in the majority opinion of the court of appeals. Younger formed the basis for the opinion of the dissenting judge on the court of appeals, however, and petitioners ask that certiorari be granted solely to consider the applicability of the Younger doctrine.

ARGUMENT

I. THE DECISIONS OF THE COURTS BELOW FINDING YOUNGER ABSTENTION INAPPLICABLE DO NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT BECAUSE THE ELEMENTS NECESSARY FOR YOUNGER TO APPLY ARE NOT PRESENT HERE

Both the district court and the court of appeals agreed on the fundamental fact which counsels against certiorari in this case: Younger abstention is inappropriate here because none of the elements warranting its application is present. Petitioners did not commence a state proceeding against the Harris plaintiffs to enforce or carry out an important state interest. Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 435 (1982). The Harris plaintiffs do not, and did not, have an opportunity to raise their constitutional claims in the state

proceeding. Juidice v. Vail, 430 U.S. 327, 337 (1977). The Harris plaintiffs are not seeking to enjoin an ongoing state proceeding brought against them. Trainor v. Hernandez, 431 U.S. 434, 444 (1977). Thus, the court of appeals decision presents no conflict with this Court's decisions and, accordingly, certiorari should not be granted.

A. No Important State Interest Is Presented By The Philadelphia Defendants' Thirteen Years Of Refusing To Remedy The Unconstitutional Conditions of Confinement In Philadelphia Prisons

Under Younger abstention, a federal court must defer to an ongoing state court proceeding only "when important state interests are involved." Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. at 432. The importance of the state's interest is reflected in the nature of the state court proceeding and the state's role in it. Id.; see also Illinois v. General Electric Co., 683 F.2d 206, 212 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) (Younger inapplicable where state had not initiated "penalty action" against federal plaintiffs); DeSpain v. Johnston, 731 F.2d 1171, 1177 n.14, 1179 (5th Cir. 1984) (state's role in litigation significant in determining state interest). In particular, Younger abstention has been found to be

> best suited to cases where federal plaintiffs are trying to attack state enforcement

> procedures which have been directly applied to them. For, in such cases, the state has brought the federal plaintiffs before its own courts to protect important policy and resource interests and in such cases the plaintiffs' federal action [sic] are perceived as attempts to direct or circumvent state court adjudication.

Family Division Trial Lawyers v. Moultrie, 725 F.2d 695, 702 (D.C. Cir. 1984).

In Jackson, neither petitioners' role nor their actions have involved an attempt to enforce an important state interest. Petitioners have never sought to implement or enforce a state statute or procedure, but rather have attempted to avoid implementation of state court orders designed to bring Philadelphia's prisons into conformity with federal constitutional standards. In this regard, petitioners are distinctly unlike other government defendants in Younger cases, where principles of federalism require federal courts to permit state authorities to carry out state policies in state courts free from federal intervention. See, e.g., Moore v. Sims, 442 U.S. 415 (1979) (federal court defendants were state officials who had commenced initial state court proceeding to gain temporary custody over abused children). Rather, the Philadelphia defendants in this action were defendants in the Jackson case, appearing involuntarily in state court to defend unsuccessfully their unconstitutional prison system. The court

of appeals correctly relied on this lack of an important state interest in finding Younger inappropriate:

> Since the municipal and state officials are defendants in the state proceeding resisting the enforcement of federal constitutional rights, rather than plaintiffs or prosecutors seeking vindication of state law enforcement policies, the trial court did not err in declining to dismiss on the authority of Younger v. Harris and its progeny.

(A-29.) (footnote omitted.) Thus, petitioners' resistance to rectifying the unconstitutional conditions in the prison they maintain implicates no state interest, and the court of appeals decision so ruling was in accord with decisions of this Court.

Petitioners also claim that the subject matter of the state proceeding -- the administration of a county prison system -- is sufficiently a state matter to warrant Younger abstention. Although a municipality has an interest in the day-to-day administration of its prisons, "[w]hen conditions of confinement amount to cruel and unusual punishment, 'federal courts will discharge their duty to protect constitutional rights.'" Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (quoting Procunier v. Martinez, 416 U.S. 396, 405-06 (1974)); see also Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983), cert. denied, 104 S. Ct. 1615 (1984) (affirming population cap); Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980) (limiting population at county jail); Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979),

aff'd on rehearing, 636 F.2d 1364 (5th Cir.) (en banc), cert. dismissed sub nom. Ledbetter v. Jones, 453 U.S. 950 (1981) (limiting population in county jail); Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978) (directing reduction of population in Charles Street Jail). Thus, the mere fact that the Harris action involves issues of prison administration does not warrant federal court abstention.

Petitioners' argument that the subject matter of the state lawsuit alone warrants federal abstention is particularly weak where, as here, the federal interest involved -- vindication of federal constitutional rights raised pursuant to 42 U.S.C. §1983 -- is strong. See, e.g., United States v. City of Pittsburgh, 589 F. Supp. 179, 184 (W.D. Pa. 1984) (abstention unjustified where federal interest outweighed state interest). This Court has long recognized that

> "[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law...."

Patsy v. Board of Regents, 457 U.S. 496, 503 (1982) (quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972)). See also Trainor v. Hernandez, 431 U.S. at 456 (Brennan, J., dissenting). Here, section 1983 is being invoked by the Harris plaintiffs as intended by Congress, to seek relief from violations of their

constitutional rights by defendants' continued operation of an unconstitutionally-overcrowded prison system. The mere fact that a municipality, by definition, may have an interest in the administration of a municipal facility is not sufficient to outweigh the powerful concerns underlying section 1983. See Goldie's Bookstore v. Superior Court, 739 F.2d 466, 469 (9th Cir. 1984) (abstention "an extraordinary and narrow exception" to federal court's weighty obligation to exercise jurisdiction when relief is sought under section 1983); Johnson v. Kelly, 583 F.2d 1242, 1252 (3d Cir. 1978) (state's interest in tax revenues insufficient to warrant abstention in section 1983 case).[7] Therefore, the minimal state interest embodied in the Philadelphia defendants' opposition to state court efforts to alleviate the conditions of confinement in Philadelphia prisons does not warrant dismissal of an action alleging cruel and unusual punishment in those prisons.

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7. Application of Younger abstention on the facts of this case would also create a conflict with other opinions of this Court. Where, as here, there is no pending state proceeding involving the federal plaintiffs, a decision requiring the federal plaintiffs to pursue state court remedies would be contrary to this Court's decision in Patsy v. Board of Regents, 457 U.S. at 500-16, in which an exhaustion requirement in section 1983 actions was specifically rejected. See also Monroe v. Pape, 365 U.S. 167, 183 (1961).

B. The Jackson Proceeding Does Not Afford An Opportunity For Respondents' Federal Constitutional Claims To Be Raised In State Court

Younger abstention is not only inappropriate because of the lack of an important state interest being asserted by petitioners in the state court, but also because the Jackson proceeding affords no opportunity for the Harris plaintiffs to raise their federal constitutional claims. "[W]hether the state proceedings afford an adequate opportunity to raise the constitutional claims" is a significant element in determining whether Younger abstention is appropriate. Moore v. Sims, 442 U.S. at 430. Where the federal plaintiff does not have an opportunity to raise federal constitutional claims in the state proceeding, federal courts must exercise their jurisdiction. Id. at 432; see also Juidice v. Vail, 430 U.S. at 336-37 (quoting Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975)).

In the Jackson case, commenced in 1971, plaintiffs alleged that various Philadelphia officials violated their constitutional rights by subjecting them to particular conditions of confinement which plaintiffs claimed were unconstitutional. The Jackson plaintiffs sought injunctive relief only, and the trial court rendered a verdict in their favor in 1972, which was affirmed by the highest court of the state in 1974. All substantive consideration of the claims against the Jackson

defendants ceased on that date. The only issue considered by the Jackson court from 1974 to the present is whether the Jackson defendants are in compliance with that court's series of remedial orders.

The Harris plaintiffs allege that their constitutional rights have been violated in a different way. They claim that, beginning in 1980, the several defendants -- with full knowledge that the conditions of Philadelphia's prisons had been adjudged unconstitutional and in violation of court orders to remedy those conditions -- subjected them to conditions of confinement which violated the federal constitution. The Harris plaintiffs seek not only injunctive relief, which potentially could parallel the state court's orders that the Philadelphia defendants cease their ongoing violations of the rights of inmates incarcerated in their prisons, but monetary damages as well to compensate them for the constitutional injuries they have suffered.[8]

The Harris plaintiffs' claims could not have been heard by the Jackson court initially because their claims did not arise

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8. The Harris plaintiffs also seek a declaration that the particular conduct of petitioners -- i.e., subjecting plaintiffs to unconstitutional conditions with full knowledge, and in direct contravention, of the Jackson decrees -- violates the Constitution. Because this issue could not have been adjudicated in the Jackson lawsuit, abstention is not warranted by the claim for declaratory relief. See Steffel v. Thompson, 415 U.S. 452 (1974).

until 1980 -- six years after the Pennsylvania Supreme Court's affirmance of the Jackson decision.[9] Moreover, the Harris plaintiffs' claims cannot now be heard by the Jackson court because, as the court of appeals noted, "[t]he liability phase of the state court case is long concluded." (A-33.) Furthermore, contrary to petitioners' strident mischaracterizations, the Harris plaintiffs are not, and could not have been, parties to the Jackson action. That action was brought by the named plaintiffs "on behalf of themselves and all others similarly situated," Jackson v. Hendrick, No. 71-2437, slip op. at 2 (C.P. Phila. April 7, 1972), that is, persons incarcerated in Philadelphia prisons in 1971. None of the Harris plaintiffs was incarcerated in Philadelphia prisons before 1980. Therefore, the Harris plaintiffs cannot have been, and are not, members of the Jackson class, and the court of appeals so held:

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9. The court of appeals unanimously held that the Harris plaintiffs' claims were not barred by the doctrine of res judicata and did not warrant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). (A-23-26; A-43.) In so holding, the court of appeals specifically stated that "[n]o member of the [Harris] class even had a cause of action ... growing out of the conditions in Holmesburg in 1971, for no such class member was subjected to those conditions." (A-25.) Petitioners have not challenged this holding in their petition and cannot now collaterally attack that holding by arguing that the Harris plaintiffs' claims were, or could have been, before the Jackson court.

> There is no identity of persons or parties between the present class members and the named plaintiffs in the Common Pleas Court action.[10] (A-25).

There is simply no rational means by which the Harris plaintiffs' constitutional claims may be heard in litigation to which they are not parties and which has already proceeded to judgment and completed appellate review. DeSpain v. Johnston, 731 F.2d at 1179 ("the state court proceeding was 'pending' within the meaning of Younger ... until the appellate proceedings were exhausted"); J.P. v. DeSanti, 653 F.2d 1080, 1085 (6th Cir. 1981) (federal court did not abstain because juveniles' challenge was to state court's post-adjudication use of their compiled

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10. Petitioners' assertion that respondents admitted in their Amended Complaint that they were members of the Jackson class is incorrect. First, respondents cannot "admit" the truth of a fact which, on the record, is plainly incorrect. Thus, where, as here, the record demonstrates that the Harris plaintiffs were not members of the Jackson class, no "admission" to the contrary can be controlling or probative. Moreover, the Harris plaintiffs' assertion, in paragraph 50 of the Amended Complaint, that they were included among the intended beneficiaries of the injunctive relief ordered by the Jackson court was not intended as an admission that they were members of the Jackson class, but rather as an assertion that they, as persons subject to conditions adjudged unconstitutional in 1972, were entitled to the benefits of that adjudication and accompanying injunctive relief. To the extent that the challenged averment of paragraph 50 may be pivotal in determining whether respondents were in fact members of the Jackson class, respondents respectfully note their intention to seek leave to amend the complaint to clarify that they were not members of the Jackson class but were entitled to the benefits of the injunctive relief ordered in that case.

social histories and could not be raised in any pending state judicial proceedings). Accordingly, even though the state court has retained jurisdiction over the remedy in Jackson, Younger abstention is inappropriate because federal court jurisdiction over the Harris plaintiffs' claims in no way involves claims which have been or could have been heard in state court.[11]

C. The Harris Plaintiffs Are Not Seeking To Enjoin Any State Court Lawsuit Or Proceeding

In each action in which this Court has required federal court abstention on the basis of the Younger principles, federal plaintiffs have requested federal courts to enjoin the operation of a state procedure or proceeding, or to enjoin the application of a state statute alleged to be unconstitutional. See, e.g., Moore v. Sims, 442 U.S. 415 (1979) (federal plaintiffs challenged constitutionality of Texas child custody laws, seeking

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11. Even if this Court were to order that Younger abstention applied to respondents' claims for injunctive relief, such an Order would not result in dismissal of the Harris action. Respondents would continue to pursue their claims for monetary damages against the Philadelphia defendants and their claims for monetary and injunctive relief against defendants Marks and Waldman. Such a result would place the district court in the incongruous position of being able to find petitioners liable for violating respondents' constitutional rights, but without jurisdiction to enjoin the unconstitutional behavior. This incongruity further emphasizes the difference between the Harris plaintiffs' claims and those raised in Jackson. Cf. Williams v. Red Bank Board of Education, 662 F.2d 1008, 1024 (3d Cir. 1981) (plaintiffs' claims for damages would ripen only after state proceedings were completed).

to enjoin Texas officials from proceeding against them under the challenged statute); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (federal plaintiff sought to prevent, by federal intervention, enforcement of a state court judgment declaring its theater a nuisance). In each case, a district court's decision not to abstain created the spectre that a federal court, if it found for the plaintiff on the merits, would be placed in the position of ordering a state court -- or officials seeking to enforce state law in state court -- to refrain from exercising authority over the state defendant/federal plaintiff. Williams v. Red Bank Board of Education, 662 F.2d 1008, 1017-18 (3d Cir. 1981). In each such situation, comity justified "the Younger doctrine of nonintervention" because federal intervention improperly suggested federal court superiority in the vindication of constitutional rights and disregard of the state interests pursued by the challenged statute or proceeding. Juidice v. Vail, 430 U.S. at 334; see also Huffman v. Pursue, Ltd., 420 U.S. at 609 ("Federal post-trial intervention, in a fashion designed to annul the results of a state trial ... deprives the States of a function which quite legitimately is left to them....")

Here, however, the Harris plaintiffs do not seek to annul the results of the Jackson trial nor to enjoin the state courts from enforcing its 1972 order declaring Philadelphia

prison conditions unconstitutional. Nor does the Harris case involve an attempt to enjoin state or local government officials from pursuing any legitimate governmental objective through the state courts. See part I.A. supra. Rather, the only injunction sought here is that which would prevent the continued violations of the plaintiffs' constitutional rights. The possibility of the Harris court entering such an injunction does not threaten concepts of comity or federalism because this federal action does not seek to stop or undo a state court action. Cf. Wooley v. Maynard, 430 U.S. 705, 711 (1977) (Younger does not bar federal jurisdiction where injunctive relief sought is "wholly prospective"); Schneider v. Colegio de Abogados, 546 F. Supp. 1251, 1274-75 (D.P.R. 1982) (despite Puerto Rican court's retention of jurisdiction for purposes of supervising remedy, state court proceeding found not "ongoing" and subsequent federal court action concerning prospective events not dismissed on basis of Younger).[12] Thus, Younger abstention is neither required nor

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12. Despite their intention to seek relief consistent with that ordered by the Jackson court, the Harris plaintiffs acknowledge the theoretical possibility that an order granting them relief from defendants' constitutional infractions could conflict with a state court order. Because, however, of the congruent objectives of both courts -- the eradication of unconstitutional conditions of confinement in Philadelphia prisons -- the potential for such a conflict is too insubstantial to outweigh the considerations favoring federal jurisdiction. See Champion International Corp. v. Brown, 731 F.2d 1406, 1408 (9th Cir. 1984) (where federal
(CONTINUED)

appropriate in this context, and the decision of the court of appeals on this issue was consistent with the prior decisions of this Court.

D. Where The Essential Elements For Younger Abstention Are Not Present, This Court Has Refused To Grant Certiorari To Consider The Younger Issue

The courts below held that abstention is not proper here, because the Jackson proceeding does not involve the enforcement of state law, does not provide an opportunity for the Harris plaintiffs to raise their federal claims, and will not be enjoined by the Harris court. This Court has previously considered whether to grant a petition for writ of certiorari in a case involving very similar facts. In that case, Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), the court of appeals had also declined to order abstention, and this Court denied the defendant state officials' petition for writ of certiorari. 450 U.S. 1041 (1981).

In Ramos, an inmate at a Colorado State Penitentiary filed a class action lawsuit in federal court challenging the conditions of confinement at the prison. The district court had

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plaintiff claimed that order of state human rights commission concerned area preempted by federal law, interference with state administrative and judicial process represented by possibility of federal court's enjoining enforcement of order not substantial enough to justify abstention).

refused to abstain and ordered the prison closed. On appeal, defendant state prison officials argued that the federal court should have abstained because plaintiff inmates could have participated in "several pending state proceedings in which the conditions of confinement" at the challenged institution were at issue. 639 F.2d at 563. The court of appeals refused to require absention, emphasizing the difference in procedural posture between the typical Younger case and the one before it.

> [T]his is not a case in which the plaintiffs have attempted to enjoin a pending state proceeding initiated by the state against them in which they would have an opportunity to present their federal claim in a state forum.... Here there is no pending state proceeding initiated by the state. There are only pending actions in the state court with a number of similar issues, in which the plaintiff class might have intervened.... [T]he district court correctly determined that abstention under the Younger line of cases was inappropriate.

Id. at 565 (citations omitted, emphasis added).

The clear inapplicability of Younger to this type of situation has created consistency and certainty among the circuits. See Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984) (in action by prisoner challenging conditions of confinement in segregation area of prison, court of appeals upheld district

court's decision not to abstain, citing Ramos).[13] In Crawley v. Hamilton County Commissioners, 744 F.2d 28 (6th Cir. 1984), an action in which inmates at a county jail brought a section 1983 lawsuit challenging the conditions of confinement in the jail, the court of appeals reversed the district court's dismissal of the action on the basis of Younger. Defendants in Crawley had argued that the district court should abstain from deciding the inmates' claims on the ground that a state court decision, subsequently affirmed by a state appellate court, had ordered closure of the facility until a new jail was completed. Defendants claimed to be attempting to comply with the state court's order. The court of appeals refused to apply Younger, despite the existence of the parallel state proceeding:

> However, Younger and its progeny all have a procedural posture which is very different from our case. In the typical Younger case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally available to the would-be federal plaintiff as a defense in the state proceedings.... In our case, the federal plaintiffs are also plaintiffs in the state court action. In addition, the

13. International Prisoners' Union v. Rizzo, 356 F. Supp. 806 (E.D. Pa. 1973) is not to the contrary. There, the complaint was filed less than one year after the trial court's decision in Jackson and raised precisely the same claims that had just been adjudicated in Jackson.

> plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for Younger abstention in this case.

744 F.2d at 30 (citation omitted) (emphasis original). The court of appeals then reversed the district court's decision and remanded to the district court to hear the case on the merits. See also Miofsky v. Superior Court, 703 F.2d 332, 338 (9th Cir. 1983) (Younger abstention inapplicable because "Miofsky does not seek to enjoin state criminal proceedings, 'quasi-criminal' proceedings, proceedings in aid of the criminal law, proceedings initiated by the state in its sovereign capacity, or proceedings brought to vindicate a vital state interest").

Thus, this Court's past refusal to grant certiorari in similar cases and the clear inapplicability of Younger to this situation make granting the instant petition particularly inappropriate. Accordingly, the Philadelphia defendants' petition for certiorari should be denied.

II. EVEN IF THE BASIC ELEMENTS WARRANTING ABSTENTION WERE PRESENT, NO CONFLICT WITH THIS COURT'S DECISIONS IS PRESENTED BY THE LOWER COURTS' REFUSAL TO APPLY YOUNGER BECAUSE DEFENDANTS' ACTIONS CONSTITUTE BAD FAITH AND HAVE DELAYED IMPERMISSIBLY THE CORRECTION OF THE UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT AT HOLMESBURG

If the basic elements warranting application of the Younger doctrine were present in this action, defendants would still only be entitled to a presumption that the federal courts

should abstain. DeSpain v. Johnston, 731 F.2d at 1176. That presumption may be overcome where it appears that the state has acted with bad faith or where such other "extraordinary circumstances" pertain to make the exercise of federal jurisdiction appropriate. Younger v. Harris, 401 U.S. at 53-54. "Federal courts must closely examine the circumstances surrounding the nature and status of the pending state litigation to determine whether an exception to the Younger doctrine is warranted." Central Avenue News, Inc. v. City of Minot, North Dakota, 651 F.2d 565, 568 (8th Cir. 1981) (citations omitted).

This Court has continually reaffirmed the Younger court's dictum that abstention may be inappropriate in certain circumstances despite the existence of an ongoing state court enforcement proceeding involving the federal parties. See, e.g., Moore v. Sims, 442 U.S. at 430-34; Trainor v. Hernandez, 431 U.S. at 442; Kugler v. Helfant, 421 U.S. 117, 124-25 (1975). Although no case similar to the instant case has applied this principle, the basic premise that abstention is not appropriate unless the state proceeding provides "a fair and sufficient opportunity for vindication of federal constitutional rights" is fully applicable here. Kugler v. Helfant, 421 U.S. at 124. Without federal intervention, the Harris plaintiffs will suffer irreparable injury by their confinement in unconstitutional conditions, and

the inability or unwillingness of the Philadelphia defendants or the state court to eliminate those conditions dims the prospect of relief without federal intervention.

The Amended Complaint alleges facts which, if accepted as true, constitute sufficiently extraordinary circumstances to require the federal court to exercise its jurisdiction. The Philadelphia defendants have resisted at every turn attempts by the state courts to implement the remedies awarded the Jackson plaintiffs: The defendants have been held in contempt of court for failure to comply with the Jackson court's orders. Amended Complaint ¶37. Moreover, defendants have continued to operate Philadelphia prisons with a population roughly twice that ordered by the Jackson court over a period of at least ten years from that adjudication. Amended Complaint ¶45. Those ten years of delay (now thirteen) in remedying such basic problems are extraordinary, are indicative of bad faith, and convincingly demonstrate that the Harris plaintiffs cannot rely on the state proceedings for relief. See Gibson v. Berryhill, 411 U.S. 564, 577-79 (1973) (Younger abstention not appropriate, despite ongoing state proceedings, because state administrative body was incompetent to adjudicate issues before it) (cited with approval in Middlesex); W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486, 491 (7th Cir. 1984) (prior adverse precedent in state court may

indicate prejudgment of issue making Younger abstention inapplicable).[14]

Moreover, in Scott v. Germano, 381 U.S. 407 (1965) a reapportionment case, this Court held that where state-adjudicated constitutional violations are left uncorrected, considerations of comity do not bar federal equitable relief. In Scott, this Court required only that the district court give the state authority a reasonable period of time to remedy its unconstitutional procedures before the district court could order relief. 381 U.S. at 409. Here, the local authorities have been given thirteen years to remedy the unconstitutional conditions of confinement at Holmesburg Prison -- far more than that required by Scott. Thus, a decision requiring abstention on the facts pleaded in the Amended Complaint would also conflict with this Court's decision in Scott.

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14. Moreover, much of petitioners' argument is based on matters de hors the Amended Complaint, viz., fragments of the record in Jackson v. Hendrick which are supposed to demonstrate the positive strides taken by state officials since the inception of this federal suit toward the elimination of overcrowding and other oppressive conditions of confinement in Holmesburg. See Petitioners' Brief at 11.

The Harris plaintiffs have had no opportunity to counter the representations made by defendants regarding their recent efforts and changes. If post-complaint occurrences are to be considered, both Rule 12(a) of the Federal Rules of Civil Procedure and principles of fairness dictate that notice should be provided to plaintiffs in order that they may produce counter-affidavits. In short, the Court cannot base its decision solely on the city's representations regarding the current state of the record. Petitioners' casual references to matters outside the Amended Complaint misled Judge Garth, dissenting in the court of appeals, into believing that the Pennsylvania Supreme Court has directed compliance with court orders concerning, inter alia, population caps and multiple-celling. In fact, the Pennsylvania Supreme Court, by staying the Jackson court's order of June 22, 1984, has relieved petitioners of any immediate duty to limit population or avoid the multiple celling of inmates in Holmesburg prison.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, ANDRE MOORE, FRANK C. HANSFORD, JR., TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 82-1847
IRENE PERNSLEY, individually and in her official capacity as Welfare Commissioner of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, JOHN DAUGHEN, individually and in his official capacity as Warden of Holmesburg Prison, RODNEY D. JOHNSON, individually and in his official capacity as Managing Director of the City of Philadelphia, HON. WILLIAM J. GREEN, individually and in his official capacity as Mayor of the City of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, and	:	

RONALD J. MARKS, individually and in his official capacity as Commissioner of the Pennsylvania Bureau of Corrections,

Defendants. : CLASS ACTION

AMENDED COMPLAINT

PLAINTIFFS

1. Plaintiff Martin Harris, a/k/a Arthur Carmichael, is an adult individual who was an inmate at the Holmesburg Prison from April, 1980, until November 24, 1982.

2. Plaintiff Albert Anthony is an adult individual who was an inmate at the Holmesburg Prison from November 8, 1981, until June 25, 1982.

3. Plaintiff Orlando X. McCrea is an adult individual who has been an inmate at Holmesburg Prison since October, 1981.

4. Plaintiff Andre Moore is an adult individual who was incarcerated at Holmesburg Prison at the time this action was commenced.

5. Plaintiff Frank C. Hansford, Jr. is an adult individual who was an inmate at Holmesburg Prison from May, 1981, until June 29, 1982.

6. Plaintiff Tyrone Glenn is an adult individual who was an inmate at the Holmesburg Prison from September, 1980, until July 23, 1982.

7. Plaintiff Carlos Royster is an adult individual who was an inmate at the Holmesburg Prison from February, 1981, until July 23, 1982.

8. Plaintiff Amin Abdullah is an adult individual who has been an inmate at Holmesburg Prison since December, 1981.

9. Plaintiff Khalid Allah Muhammad is an adult individual who was an inmate at Holmesburg Prison from February, 1982, until June 5, 1982.

10. Plaintiff Arnold Furtick is an adult individual who was an inmate at Holmesburg Prison from April, 1981, until May 24, 1982.

DEFENDANTS

11. Defendant Irene Pernsley is Welfare Commissioner of the City of Philadelphia, in which capacity she directs the operation of the Department of Public Welfare. The Department of Public Welfare has general supervisory powers over all city correctional institutions and has the responsibility for determining the capacity of city institutions and for recommending changes in prison practices. 351 Pa. Code §5.5-700.

12. Defendant Royal L. Sims is the Chairman of the Board of Trustees of the Philadelphia Prison System. The Board of Trustees directs and controls the management of

the institutions within the Philadelphia Prison System. 351 Pa. Code §5.5-701.

13. Defendants Rev. Albert Campbell, Labora Bennett, James Barber, Mark Mendel and Donald Padova are members of the Board of Trustees of the Philadelphia County Prisons.

14. Defendant David S. Owens is the Superintendent of the Philadelphia Prison System.

15. Defendant John Daughen is Warden of Holmesburg Prison, a prison in the Philadelphia Prison System.

16. Defendant Rodney D. Johnson is Managing Director of the City of Philadelphia.

17. Defendant William J. Green is the Mayor of the City of Philadelphia.

18. Defendant City of Philadelphia is a Pennsylvania City of the First Class with independent powers of governance authorized by 53 P.S. §13101 et seq. and embodied in its Home Rule Charter, Title 351 of the Pennsylvania Code.

19. Defendant Jay C. Waldman is General Counsel for the Commonwealth of Pennsylvania. As General Counsel, his duties include establishing standards for county jails and prisons, including standards for physical facilities, and inspecting said jails and prisons in order to determine

their eligibility to receive prisoners sentenced to maximum terms of six months or more but less than five years. 61 P.S. §460.3(3), (4) (Supp. 1982-83); 71 P.S. §732-502 (Supp. 1982-83).

20. Defendant Ronald J. Marks is the Commissioner of the Pennsylvania Bureau of Corrections.

21. Each defendant has personal responsibility for some aspect of the supervision and maintenance of Holmesburg Prison, including the establishment and enforcement of standards pertaining to the physical characteristics of the institution, inmate population and security, and correctional programs of treatment, education and rehabilitation.

JURISDICTION AND VENUE

22. The Court has jurisdiction over the subject matter of this action by virtue of 28 U.S.C. §1343(a)(4), this being an action seeking declaratory, injunctive, and monetary relief under an Act of Congress providing for the protection of civil rights.

23. Venue in this judicial district is proper by virtue of 28 U.S.C §1391(b), in that the claim arose in the Eastern District of Pennsylvania.

CLASS ALLEGATIONS

24. Plaintiffs seek to maintain this action as a class action pursuant to Fed.R.Civ.P. 23(b)(2). They bring

this action on their own behalf and as representatives of a class consisting of all persons who have been inmates of Holmesburg Prison since April 30, 1980, and on behalf of all future inmates of Holmesburg Prison. Plaintiffs estimate that there are more than 1000 inmates at Holmesburg at any given time and that this figure alone constitutes a class of sufficient numerosity as to make joinder impracticable.

25. All of the named plaintiffs are individuals who were inmates at Holmesburg Prison at the time of the commencement of this action, and plaintiffs McCrea and Abdullah are currently incarcerated at Holmesburg Prison. The plaintiffs' claims are not only typical of, but also coextensive with, the claims of the class.

26. The major questions of law and fact in this proceeding involve determinations of whether overcrowding at Holmesburg Prison has created conditions of confinement constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. These questions are common to the class which plaintiffs seek to represent.

27. Plaintiffs will fairly and adequately represent the interests of the other members of the class. The interests of plaintiffs coincide with, and are not antagonistic to, those of the other members of the class, and plaintiffs are represented by capable counsel.

28. The grounds on which defendants have acted and failed or refused to act are the grounds generally applicable to the class, making final injunctive and declaratory relief appropriate to the class as a whole.

29. Plaintiffs' requests for declaratory and injunctive relief predominate over their claims for monetary damages.

BACKGROUND OF JUDICIAL CONSIDERATION OF CONDITIONS AT HOLMESBURG PRISON

30. Holmesburg Prison is one of three county prisons which make up the Philadelphia Prison System. In February, 1971, five prisoners in the Philadelphia Prison System filed a class action in equity in the Court of Common Pleas of Philadelphia County requesting injunctive relief from conditions of confinement in the Philadelphia county prisons which violated their constitutional and statutory rights. This action was entitled Jackson v. Hendrick, February Term, 1971, No. 2437. The Jackson defendants included prison and other city officials and the City of Philadelphia itself (hereinafter referred to as the "Jackson defendants").

31. On April 7, 1972, following a lengthy trial, the three-judge court en banc in Jackson v. Hendrick handed down a 264-page Opinion and Decree Nisi holding that the

conditions in the Philadelphia county prisons violated the rights of the inmates under the United States and Pennsylvania Constitutions and under certain state statutes.

32. A final Decree was entered on June 7, 1972, affirming the Opinion and Decree Nisi. The decree was upheld on appeal in Hendrick v. Jackson, 10 Pa. Cmnwlth. Ct. 392, 309 A.2d 187 (1973) and Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (1974).

33. In 1976, the three-judge court in Jackson v. Hendrick issued its first remedial decree which established, inter alia, a maximum capacity for the Philadelphia Prison System. On appeal, this provision and all other contested aspects of the first remedial decree were affirmed per curiam by the Commonwealth Court. Hendrick v. Jackson, No. 1385 C.D. 1976 (Pa. Cmwlth. Ct. October 17, 1977).

34. In 1977, the Jackson parties entered into a consent decree (Stipulation and Agreement I) in which the Jackson defendants agreed to implement substantially the same maximum capacity figures and other related details that had been established by the Jackson court in its first remedial decree. A true and correct copy of Stipulation and Agreement I is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth.

35. Paragraph 7 of Stipulation and Agreement I provides, in pertinent part, that

> the defendants shall set a maximum capacity for each of the three institutions for the purpose of maintaining the population at no greater than the rated level. For ... Holmesburg, the capacity shall not exceed the number of usable cells.

36. Paragraph 9 of Stipulation and Agreement I provides, in pertinent part, that

> the defendants shall house each inmate in the three institutions in a cell alone, except in instances where two inmates have signed voluntarily and without coercion a written consent form indicating a desire on the part of both individuals to share a cell, or in the case of emergencies certified to the Court by the Superintendent of Prisons for a period not to exceed twenty (20) days.

37. In December, 1977, the Jackson defendants were held in contempt of court and fined a total of $325,000.00 for failure to comply with numerous aspects of Stipulation and Agreement I.

38. Since 1977, the Jackson parties have entered into four additional consent decrees. A true and correct copy of each of the successive consent decrees, Stipulation and Agreement II, III, IV and V, respectively, is attached hereto as Exhibits B-E and incorporated herein by reference as if fully set forth.

39. The last of these decrees, Stipulation and Agreement V, was approved by the Court of Common Pleas on December 21, 1982.

PHYSICAL PLANT AT HOLMESBURG PRISON

40. Holmesburg Prison is a maximum security institution which first housed inmates in 1896. The Prison consists of ten cell blocks radiating from a central core. Each cellblock contains approximately seventy cells. Each cell is approximately twelve feet long by nine feet wide, with an arched ceiling about ten or twelve feet high at the center of the arch. Each cell can accommodate properly a single inmate only.

OVERCROWDING AT HOLMESBURG PRISON

41. The maximum capacity permitted at Holmesburg Prison under current court order is approximately 700. At all times since April 30, 1980, the inmate population of Holmesburg Prison has exceeded 700 by a substantial amount. The current population at Holmesburg is approximately 1300, or approximately 600 more inmates than may lawfully be incarcerated there.

42. As a direct and proximate result of the overcrowding alleged in paragraph 41, two and sometimes three inmates are housed in a cell designed for a single person.

43. As a direct and proximate result of the overcrowding alleged in paragraph 41, plaintiffs have been subjected to, and injured by, the following deficiencies in Holmesburg Prison:

(a) inadequate screening of incoming inmates resulting in especially violent or chronic offenders being placed in the general population;

(b) unsanitary preparation and service of food;

(c) inadequate heat and ventilation;

(d) unemptied trash cans and accumulation of trash and litter;

(e) lack of storage space for personal belongings, resulting in loss through theft, and exposure to dripping water, dirt, and rodents;

(f) lack of sufficient bedding, towels, and toiletries;

(g) insufficient emergency exits and training of inmates regarding safe exit in case of fire;

(h) reduced or inadequate access to (1) recreational facilities; (2) work

assignments; (3) educational programs; (4) library and library books; (5) legal materials; (6) religious services; and (7) telephones;

(i) impairment of visitation rights, including visits by legal counsel to inmates.

44. As a direct and proximate result of the overcrowding alleged in paragraph 41, plaintiffs have been subjected to physical and psychological injury from violent attacks, sexual assaults, and threats of physical violence by other inmates.

45. The conditions which were the subject of the original decree in Jackson v. Hendrick, including overcrowding and the deprivations resulting therefrom, have continued to obtain without material change into the period from April 30, 1980, to the date of this amended complaint, despite the remedial decrees and consent decrees addressed to these very conditions.

COUNT ONE

46. Plaintiffs incorporate herein by reference the allegations of paragraphs 1-45, inclusive, as if fully set forth.

47. Each of the defendants, with full knowledge of the existence of unconstitutional conditions of confinement at Holmesburg Prison, has acted or failed to act in such a way as to continue and exacerbate the overcrowding and resulting unconstitutional conditions at Holmesburg.

48. As a direct result of the overcrowding at Holmesburg and the resulting deprivation of services and subjection of plaintiffs to injurious, unsafe, unsanitary, hostile, and degrading conditions, the defendants have deprived plaintiffs of rights guaranteed to them by the Eighth and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. §1983.

WHEREFORE, plaintiffs pray that the Court enter judgment against the defendants and in favor of plaintiffs declaring the conditions of confinement at Holmesburg Prison to be unconstitutional and enjoining the defendants from continuing to incarcerate plaintiffs under unconstitutional conditions. Plaintiffs further pray that the Court enter judgments of monetary damages against defendants and in favor of plaintiffs to redress the violation of plaintiffs' constitutional rights stated herein, award to the plaintiffs their costs and attorneys' fees, and provide such other relief which the Court deems appropriate.

COUNT TWO

49. Plaintiffs incorporate herein by reference the allegations of paragraphs 1-48, inclusive, as if fully set forth.

50. The provisions of the consent decrees which arose out of the Jackson v. Hendrick case, and in particular Paragraphs 7 and 9 of Stipulation and Agreement I, entitle each member of the plaintiff class in Jackson v. Hendrick (which includes the entire plaintiff class herein) to be placed in an prison environment free from unconstitutional conditions and to be housed in a cell alone while incarcerated at Holmesburg Prison.

51. Defendant City of Philadelphia has failed to fulfill the requirements of said consent decrees relating to the housing of inmates and associated problems.

52. Defendant City of Philadelphia, through adoption of a pattern or practice reflecting official policy, has deprived plaintiffs of fundamental and significant liberty interests without due process of law, in contravention of the Fourteenth Amendment to the U.S. Constitution and in violation of 42 U.S.C. §1983.

WHEREFORE, plaintiffs pray that the Court enter judgment against Defendant City of Philadelphia and in favor of plaintiffs declaring the City of Philadelphia in violation

of the five consent decrees issued in Jackson v. Hendrick, declaring such violation unconstitutional, enjoining the City of Philadelphia from continued violation of said decrees, and rewarding plaintiffs monetary damages, costs and attorneys' fees, and such other relief which the court deems appropriate.

COUNT THREE

53. Plaintiffs incorporate herein by reference the allegations of paragraphs 1-52, inclusive, as if fully set forth.

54. Defendants Waldman and Marks, by classifying the Philadelphia county prisons as eligible to receive prisoners sentenced to maximum terms of six months or more but less than five years, notwithstanding Holmesburg Prison's unconstitutional conditions, have subjected said prisoners to a deprivation of rights guaranteed to them by the Eighth and Fourteenth Amendments to the United States Constitution in violation of 42 U.S. C. §1983.

WHEREFORE, plaintiffs pray that the Court enter judgment against defendants Waldman and Marks and in favor of plaintiffs declaring that the classification of the Philadelphia county prisons by defendants Waldman and Marks as eligible to receive prisoners sentenced to maximum terms of six months or more but less than five years has subjected those prisoners to unconstitutional conditions at Holmesburg

Prison; plaintiffs pray that the Court enter judgment against defendants Waldman and Marks enjoining them from continuing to subject prisoners to unconstitutional treatment through said classification of the Philadelphia county prisons. Plaintiffs further pray that the Court enter judgments of monetary damages against defendants Waldman and Marks and in favor of plaintiffs to redress the violation of plaintiffs' constitutional rights stated herein, award to the plaintiffs their costs and attorneys' fees, and provide such other relief which the Court deems appropriate.

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Attorneys for Plaintiffs
MARTIN HARRIS, et al.

GERALD JACKSON, et al
Plaintiffs

v.

EDWARD J. HENDRICK, et al
Defendants

: COURT OF COMMON PLEAS
: TRIAL DIVISION
:
: FEBRUARY TERM, 1971
: NO. 2437
: COMPLAINT IN EQUITY
: (CLASS ACTION)

STIPULATION AND AGREEMENT (I)

TO THE HONORABLE THEODORE B. SMITH, JR., THE HONORABLE ROBERT W. WILLIAMS, JR., THE HONORABLE PAUL A. DANDRIDGE, JUDGES OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY:

AND NOW, the 4th day of February, 1977, the parties to this action, by their undersigned attorneys, hereby stipulate and agree as follows:

1. The Court will retain jurisdiction of the parties and of the cause of action.

2. The defendants agree to limit their presently pending appeal in the Commonwealth Court (No. 1385 C.D. 1976) to paragraphs 5, 6, 7, 8, 11, and 12 of Interim Decree I (issued by this Court on June 15, 1976), regarding the planning for and implementation of alternative housing for women inmates, removal of juvenile inmates, and a temporary center city holding facility.

3. Defendants hereby specifically reserve the right to raise at any future proceedings in this case, excepting the pending appeal, their right to present evidence with respect to any further Interim and Final Decrees and with respect to the issue

EXHIBIT "A"

of whether the Master has exceeded his duties in this matter.

4. The plaintiffs agree to withdraw their request for security, filed October 1, 1976, and which is presently pending before the Court.

5. The defendants agree not to appeal the modification of the supersedeas granted by Order of this Court on November 24, 1976.

6. The parties agree that the provisions of this Stipulation and Agreement shall have the full force and effect of a final Order of this Court and that any violation of this Stipulation and Agreement shall subject the violating parties to contempt of court proceedings.

Overcrowding

7. Within thirty (30) days of the date of this Stipulation and Agreement, the defendants shall set a maximum capacity for each of the three institutions for the purpose of maintaining the population at no greater than the rated level. For the House of Correction and Holmesburg, the capacity shall not exceed the number of usable cells. For the Detention Center, the capacity shall not exceed the number of usable cells plus the number of beds originally projected for each dormitory area. The defendants shall report these capacity figures to the Master within thirty (30) days.

8. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall complete whatever maintenance and/or reconditioning procedures are necessary to convert all appropriate cells into adequate housing units within the rated capacity level.

9. By July 1, 1977, the defendants shall house each inmate in the three institutions in a cell alone, except in instances

where two inmates have signed voluntarily and without coercion a written consent form indicating a desire on the part of both individuals to share a cell, or in the case of emergencies certified to the Court by the Superintendent of Prisons for a period not to exceed twenty (20) days.

10. For the purposes of implementing the above paragraph 9, the defendants shall strictly comply with the procedures and consent form set forth in Appendix "A" attached hereto and incorporated by reference herein.

11. Within thirty (30) days of the date of this Stipulation and Agreement, the defendants shall notify the Bureau of Prisons of the United States Department of Justice that on and after sixty (60) days from the date of this Stipulation and Agreement no federal prisoners, other than inmates detained for an immediate court appearance, shall be housed any longer within the Philadelphia prison system.

12. On and after sixty (60) days from the date of this Stipulation and Agreement, the defendants shall refuse to house within the Philadelphia prison system any prisoners held under authority of any United States statute, other than inmates detained under such authority for an immediate court appearance.

13. By July 1, 1977, the defendants shall develop and implement an administrative mechanism to maintain the population in the three institutions at no greater than the rated level. If the population exceeds this level, persons who are held in default of $1,500 bail or less, starting with those who have been detained for the longest period of time, shall be released on their own recognizance by the Court, based on information relating to

persons held in default of $1,500 bail or less provided to the Court by the defendants.

B. Women

14. By July 1, 1977, the defendants agree to provide programs, facilities, and services for all women incarcerated in the Philadelphia prison system that are comparable to those provided for male inmates.

C. Food

15. Effective immediately, the defendants shall hire and continue to utilize the services of a dietician professionally trained in the preparation of cyclical menus and skilled at planning nutritionally wholesome and adequately balanced diets in a large institutional setting. Under the supervision of such a dietician, the defendants shall serve meals that are nutritionally wholesome and adequate for health within the context of a balanced diet with minimal and nutritionally insignificant deviations between the planned menu and the actual food served. The dietician shall make regular unscheduled visits to each institution to insure that the planned menu is being served and shall record any deviation.

16. Effective immediately, the defendants shall provide food and drink according to individual tastes, wherever possible, including, but not necessarily limited to, coffee or tea with or without milk or sugar, ketchup, mustard, salt and pepper, and drinking water.

17. Effective immediately, the defendants shall establish

food service and replenishment procedures to insure that food is not left standing uncovered after preparation or does not remain more than thirty minutes unreplenished at the steam tables and that hot food is served hot and cold food is served cold.

18. Effective immediately, the defendants shall employ no inmate or non-imate workers in the kitchens in food servicing capacities unless, prior to the work assignment, they have received all appropriate tests to detect and prevent infection, including stool cultures and blood serology.

19. Within thirty (30) days of the date of this Stipulation and Agreement, the defendants shall provide clean white clothing and hats or hairnets for all inmate and non-inmate workers in the kitchens in food servicing capacities.

20. Effective immediately, the defendants shall insure that special diets as prescribed by medical personnel are made available to inmates as needed, in compliance with the Act of April 14, 1835, P.L. 232, §7, 61 P.S. §629.

21. Effective immediately, the defendants shall maintain the kitchen, serving, and dining areas in accordance with public health standards at all times. Food handling equipment and utensils shall be washed after each usage. Floors, counters, and tables and stools shall be washed after each meal. Large kitchen appliances such as refrigerators, stoves, and cabinets shall be cleaned on a regular basis. Appropriate bulk disposal items for sealing garbage and trash prior to removal from the premises shall be utilized and garbage and trash shall be removed from the kitchen area after each meal.

22. Within s. v (60) days of the date c this Stipulation and Agreement, the defendants shall submit to the Master a report which reviews the food service and delivery system to determine its compliance with the standards of the American Correctional Association and the Pennsylvania Bureau of Corrections. Within this report, the defendants shall study, among other items, cutlery usages (including plasticware), regimented versus unstructured seating, time periods between meals, and length of meals, and assess the impact of any changes in the food service and delivery system on institutional security and morale.

Medical Facilities and Treatment

23. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall provide a sufficient number of medical doctors, nurses, and paramedic personnel to adequately perform physical examinations and treat sick call and emergency patients at each institution within the Philadelphia prison system. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall provide to the Court, for its approval, the qualifications of paramedics who will be providing services under this Stipulation and Agreement.

24. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall administer intake physicals to all new inmates within forty-eight hours of admission and prior to release into the general prison population, with such physicals being not cursory in nature, adequate to diagnose any inmate illnesses, and administered by a qualified medical doctor, in

compliance with the Act of May 10, 1921, P.L. 433, No. 208, §1, 61 P.S. §1.

25. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall establish sick call procedures on a daily basis, including weekends, within a sufficient number of hours to insure that any inmate making a sick call request is screened, not by correctional officers, but by medical or paramedic personnel, and receives appropriate treatment on the same day as the request, in compliance with the Act of April 14, 1835, P.L. 232, §7, 61 P.S. §629. The hours of physicians, nurses, and paramedics shall be staggered so that each institution has adequate coverage from 8:00 a.m. to 10:00 p.m. daily to perform the substantive medical requirements of paragraphs 23-30, inclusive, of this Stipulation and Agreement. Between 10:00 p.m. and 8:00 a.m., at least one physician or one registered nurse shall be assigned to one of the three institutions. In addition, two other medically trained personnel (physicians, nurses, or paramedics) shall be assigned to the two institutions in which the physician or nurse is not assigned. If a physician is not among the three persons on duty between 10:00 p.m. and 8:00 a.m., a physician shall be on call.

26. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall implement a program for preventive medical care, including periodic physical examinations for long-term inmates and internal examinations and PAP smears for women inmates. Inmates who have remained in custody for a period of one year shall receive a physical on the completion of one year

and annual physicals in subsequent years.

27. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall insure that medication is prescribed only by physicians and is administered to the inmates at appropriate times only by qualified medical personnel. Only a physician, paramedic, or a nurse shall have access to supplies of medication.

28. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall insure that any paramedic system which is developed includes adequate supervision by qualified medical doctors in conjunction with an overall program to supplement and improve the medical treatment provided within the prison system.

29. By July 1, 1977, the defendants shall insure that all medical personnel work in clean, safe areas, equipped with modern medical apparatus capable of performing x-rays, blood tests and serologies, and urinalysis.

30. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall maintain infirmaries in each institution which are staffed by medically trained personnel who keep all medical records and perform all other functions except for basic janitorial work.

Treatment of Drug Addicts

31. Within ninety (90) days of the date of this Stipulation and Agreement, the defendants shall maintain an Addictive Disease Treatment Program providing comprehensive treatment services in all three institutions, including group therapy sessions and drug treatment programs for all inmates who request it.

32. Within ninety (90) days of the date of this Stipulation and Agreement, the defendants shall maintain a Therapeutic Community program to provide treatment in this setting for all inmates who request it.

33. Within thirty (30) days of the date of this Stipulation and Agreement, the defendants shall maintain methods for immediate identification of addicts and for maintenance of thorough statistical records concerning the drug dependant population.

34. Within ninety (90) days of the date of this Stipulation and Agreement, the defendants shall maintain a comprehensive follow-up program on inmates leaving the prisons.

Psychiatric Facilities and Treatment

35. Within sixty (60) days of the date of this Stipulation and Agreement, the defendants shall submit to the Master a plan for a program of psychiatric treatment including therapy, counseling, and medical treatment for all inmates who request treatment or who have been determined to need psychiatric treatment. If the parties disagree on the content and procedures set forth in this plan, a hearing shall be held before the Court to allow the Court to issue an appropriate Order. If the parties agree upon a plan without further Order of the Court, that plan shall become part of this Stipulation and Agreement and shall be subject to its provisions.

36. By July 1, 1977, the defendants shall begin implementation of their plan or the Order of the Court. The defendants shall have until September 1, 1977, to complete implementation of the plan or Order.

Personal Hygiene

37. Effective immediately, the defendants shall supply clean, properly sized, and functionally adequate clothing, bedding, and personal hygiene items so that each inmate at all times will have a towel, two sheets, blanket, mattress, pillow, pillowcase, socks, shirt, pants, underwear, shoes, toothbrush, toothpaste, and soap. The defendants shall provide a bi-lingual (Spanish and English) checklist to each inmate to indicate receipt of these items. The defendants shall purchase and maintain adequate supplies of all such items in the receiving rooms so that unnecessary shortages do not occur. The defendants shall institute laundering and sanitizing procedures sufficient to provide the above.

Conclusion

38. In its concluding Finding of Fact in the original Opinion, at page 167, this Court stated that the entire Philadelphia prison system is subject to the condemnation of being "a cruel, degrading and disgusting place, likely to bring out the worst in a man."

39. This Court notes the comments of the Master that steps have been taken toward the improvement of conditions within the Philadelphia prison system over the past three years, since this Court issued its Opinion and Decree Nisi on April 7, 1972.

40. This Court notes further the indications by the Master that resolution of conflicting positions in several key areas remains for consideration and direction from this Court.

41. This Court is relying upon the good faith and due

diligence of the defendants to insure prompt and timely compliance with this Stipulation and Agreement in the spirit of providing basic humane living conditions as required by the United States Constitution and the statutes of this Commonwealth.

42. This Court expects the defendants to fill and maintain authorized staff positions, especially for correctional officers, so that a more appropriate level of security exists within the three institutions for the protection of staff and inmates. This Court will review immediately any further deficiency of correctional officers or other personnel in line with the Court's Finding of Fact Number 7 on shortgage of guards at page 16 of the original Opinion and such other Findings of Fact which relate to staffing deficiencies.

43. This Court charges the defendants with the task of explaining the provisions of this Stipulation and Agreement, including Appendix "A", to all employees within the Philadelphia prison system and with posting copies of this Stipulation and Agreement throughout the three institutions in English and Spanish.

44. Counsel for the defendants shall notify their clients in this action: Louis S. Aytch, Superintendent of Philadelphia Prisons; Frank L. Rizzo, Mayor of the City of Philadelphia; Ethel D. Allen, Lucien E. Blackwell, Beatrice K. Charnock, Joseph E. Coleman, Melvin J. Greenberg, Harry P. Jannotti, Louis C. Johanson, John B. Kelly, Jr., Cecil B. Moore, Charles E. Murray, Jr., Al Pearlman, Francis Rafferty, George X. Schwartz, James J. Tayoun, Earl Vann, Anna Cibotti Verna, and Joseph L. Zazyczny, members of the City Council of Philadelphia; Francis C. Ganiszewski,

Acting Welfare Commissioner; Angelo J. Galeone, Ralph R. Ritter, Labora Bennett, M. Mark Mendel, Royal L. Sims, and Michael J. Stack, Jr., members of the Board of Trustees of Philadelphia Prisons; Anthony C. Antonetti, Warden of Holmesburg Prison; Richard M. Burke, Warden of the Detention Center; Edward M. Forman, Warden of the House of Correction; and the City of Philadelphia of the entry of this Stipulation and Agreement and of the terms and conditions contained therein. Said notice shall satisfy the notice requirements under Rules 1517 and 1519, Pennsylvania Rules of Civil Procedure.

45. For purposes of monitoring compliance with this Stipulation and Agreement and all subsequent Decrees of this Court, counsel for plaintiffs, David Rudovsky, Edmund P. Daley, and, upon order of the Court, any other counsel who hereinafter enters an appearance on behalf of the plaintiffs, shall be permitted upon notice to the Superintendent of Prisons or his duly authorized representative, at least one day or any portion thereof in advance, to visit and inspect the following areas of each institution: cell blocks, cells, dormitories, infirmaries, hospitals, kitchens, dining areas, food storage areas, recreational areas, shower rooms, garbage and trash storage areas, medical storage areas, and psychiatric facilities. During said visits counsel may confer privately or informally with any inmate or group of inmates concerning the subject matter of this suit. The Superintendent of Prisons or his duly authorized representative may designate a prison official to accompany counsel during said inspections to insure an orderly and safe tour but not to infringe upon the

[illegible] counsel from inspecting the designated areas.

46. This Court has directed the Master to submit the further Parts of his Report in due course over the coming months so that the recommendations to be made may be considered and further Decrees may issue.

47. This Court will maintain continuing jurisdiction over these matters to monitor the changes that are required and ascertain that they become permanently established and are not subsequently abandoned, forgotten, or neglected.

Respectfully submitted,

DAVID RUDOVSKY

EDMUND P. DALEY
Attorneys for Plaintiffs

SHELDON ALBERT
City Solicitor

MARK B. FROST
Assistant City Solicitor
Attorneys for Defendants

[redacted]
Master

Approved:

THEODORE R. SMITH, JR., Judge

ROBERT W. WILLIAMS, JR., Judge

PAUL A. DANDRIDGE, Judge

With respect to the provisions of paragraph 9 of this Stipulation Agreement, defendants agree (through paragraph 10) to use the following consent form and procedure.

1. The consent form shall read as follows:

CONSENT FORM

By Order of the Court of Common Pleas of Philadelphia County, you have the right to be housed in a single cell to which NO ONE ELSE CAN BE ASSIGNED. You are not required to share a cell with anyone else in the Detention Center, the House of Correction, or Holmesburg Prison unless you voluntarily consent by signing this form.

If you decide to share a cell, you can change your mind and inform your social worker to have your cell assignment changed.

If you sign this form, you will be given a copy of it.

Direct any questions about this procedure or your right to a single cell to:

WALTER W. COHEN, MASTER
1700 Walnut Street, Suite 200
Philadelphia, PA. 19103
MU 6-2890

DAVID RUDOVSKY
1427 Walnut Street
Philadelphia, PA. 19102
LO 3-8312

EDMUND P. DALEY
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, PA. 19104
243-4628

ELLIOTT B. PLATT
Community Legal Services
3156 Kensington Avenue
Philadelphia, PA. 19134
427-4850

I CONSENT TO SHARE A CELL WITH ANOTHER PRISONER.

SIGNATURE OF INMATE: _____ DATE: _____

SIGNATURE OF PERSON WHO SECURED THE CONSENT: _____

2. No County prison official, employee, or agent shall in any manner encourage, induce, persuade, or coerce or attempt to encourage, induce, persuade, or coerce any prisoner in the Philadelphia prison system to share his or her cell with any other person. Any violation of this Order shall subject the offending party to contempt of court proceedings.

3. Any questions from any inmate concerning his or her right to single cell occupancy shall be answered in strict conformity with the language of the form set forth, supra.

4. The defendants shall provide each person who consents to share a cell with another with a copy of the form which he or she has signed and shall provide an additional copy of said form to the Master and counsel for the plaintiffs.

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Full Text

Panel Approves Agreement on Rights Of Phila. County Prisen Inmates

A stipulation and agreement which sets forth rights of inmates within the Philadelphia County prisons system and duty responsibilities of City officials to provide those rights was approved by a Philadelphia Courtroom Prison Court three-judge panel on October 31, 1978 in *Jackson et al. v. Hendrick et al.*, No. 3437 Feb. Term, 1971. The stipulation and agreement, in the nature of a consent decree, embodies an oral stipulation and agreement approved by the three-judge panel on February 4, 1977.

The defendants, who include the Mayor of Philadelphia, the members of City Council, the Commissioner of Public Welfare, the Prison Board of Trustees, the Prison Superintendent and other prison administrative officials, agreed that the October 31 "Stipulation and Agreement II" has "the full force and effect of a final Order of this Court and does not evidence . . . should subject the following parties to contempt of court proceedings."

A Philadelphia Common Pleas three-judge court had previously found that conditions in Philadelphia prisons constituted cruel and unusual punishment. *Jackson v. Hendrick*, No. 3437 Feb. Term, 1971 (April 7, 1972), aff'd Pa., 455, 302 A.2d 463 (1973).

The full text of the "Stipulation and Agreement II," signed by the attorneys for the parties, the Court-appointed Master and the panel of judges, follows:

STIPULATION AND AGREEMENT II

To the Hon. Theodore S. Smith, Jr., the Hon. Robert W. Williams, Jr., the Hon. Paul A. Dandridge, Judges of the Court of Common Pleas of Philadelphia County:

AND NOW, the 31st day of October, 1978, the parties to this action, by their undersigned attorneys, hereby stipulate and agree as follows:

1. The Court will retain jurisdiction of the parties and of the cause of action.

2. The parties agree that the provisions of this Stipulation and Agreement, shall have the full force and effect of a final Order of this Court and that any violation of this Stipulation and Agreement shall subject the violating parties to contempt of court proceedings.

Mail and Publications

3. All incoming mail or packages sent by attorneys, judges, official court personnel, or government officials shall be delivered to the inmates addressee within seven-hour (24) hours of receipt at the institution, and shall be opened in the presence of the inmate personally by a prison employee, whose sole purpose shall be to screen the contents of such mail.

4. All incoming mail or packages sent by persons other than those described in paragraph 3 supra may be opened by a prison employee in the presence of the inmate addressee, for the sole purpose of inspecting the contents for contraband, and shall be delivered to the inmate addressee within seven-hour (24) hours of receipt at the institution.

5. The defendants agree that mail addressed to a person in custody of the mail is limited to no more than three (3) sheets as set forth in paragraph 3 supra and if the incoming procedure set forth in paragraph 4 supra does not apply, are [illegible]

(a) The defendants agree [illegible]

Prison Inmates

3

(5) Shepard's United States Citations. Colorado Springs, Shepard's.

(6) Shepard's Federal Citations. Colorado Springs, Shepard's — Federal Supplement, Federal Reporter (2d Series).

(7) Rules of Federal District Court for the Eastern District of Pennsylvania.

B. General Records

C. Pennsylvania Records

A. Class I Offenses

B. Class II Offenses

A. Inmate Pending Hearing

4

[illegible]

Respectfully submitted,

DAVID RUDOVSKY
Attorney for Plaintiffs

SHELDON ALBERT
City Solicitor

JOSEPH R. LALLY
Assistant City Solicitor
Attorneys for Defendants

WALTER W. COHEN
Master

Approved:

THEODORE R. SMITH, JR.,
Judge

ROBERT W. WILLIAMS, JR.,
Judge

PAUL A. DANDRIDGE, Judge

GERALD JACKSON, et al Plaintiffs	:	COURT OF COMMON PLEAS TRIAL DIVISION
v.	:	FEBRUARY TERM, 1971 NO. 2437
EDWARD J. HENDRICK, et al Defendants	:	COMPLAINT IN EQUITY (CLASS ACTION)

STIPULATION AND AGREEMENT III

TO THE HONORABLE THEODORE [illegible]ROTH, JR., THE HONORABLE PAUL A. DANDRIDGE, THE HONORABLE CALVIN T. WILSON, JUDGES OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY:

AND NOW, the 12th day of May, 1980, the parties to this action, by their undersigned attorneys, hereby stipulate and agree as follows:

1. The Court will retain jurisdiction of the parties and the cause of action.

2. The parties agree that the provisions of this Stipulation and Agreement shall have the full force and effect of a final Order of this Court and that any violation of this Stipulation and Agreement shall subject the violating parties to contempt of court proceedings.

EXHIBIT "C"

Modifications of Stipulations and Agreements

3. Effective immediately, the requirement of paragraph 46 of the Stipulation and Agreement of October 31, 1978, to wit, that the defendants shall require a high school diploma or its equivalent as a necessary qualification for new applicants to take the civil service examination for the position of correctional officer, shall be deleted.

4. Paragraph 77 of the Stipulation and Agreement of October 31, 1978, shall be amended to read as follows:

> 77. By July 31, 1981, the defendants shall tile all shower areas on the floor and walls and clean all shower drains to insure that leaks into living areas are prevented. The defendants shall further insure that all shower areas are cleaned, scraped, and painted, where not tiled, with an appropriate paint semi-annually and that all shower drains are cleaned as needed.

5. Paragraph 18 of the Stipulation and Agreement

of February 4, 1977, shall be amended to read as follows:

18. Effective immediately, the defendants shall employ no inmate or non-inmate workers in the kitchens in food servicing capacities unless, prior to work assignment, they have received all appropriate tests to detect and prevent infection, including a blood serology.

6. Effective immediately, intake physical examinations pursuant to paragraph 24 of the Stipulation and Agreement of February 4, 1977 may be administered either by a qualified physician or a qualified physician's assistant.

Classification System

7. The defendants shall institute classification procedures that shall incorporate the principles contained in the following paragraphs, 8 to 14, effective immediately.

8. Admission - Upon reception, the admittee shall be interviewed and an intake summary completed, including social, psychological, and personal history and drug and alcohol questionnaire; the worker shall record bizarre behavior, if any, and any medication needs.

9. Medical and Psychistric Intake - The admittee

will be referred to the drug detoxification, psychiatric, or medical department for any necessary treatment. He will be placed in an appropriate housing assignment consistent with his specific needs, if serious problems requiring immediate attention exist.

10. Central Intake Unit - Within forty-eight (48) hours, all admittees shall pass through the Central Intake unit, where they will be assigned to a permanent housing area. Housing determinations will be made by the Classification Committee, which shall take into consideration the criminal, social, and psychiatric background of the inmate. Where necessary, homosexuals will be housed on a block for their own protection, but there shall be no discrimination with regard to the delivery of services and assignment of jobs, solely based on their sexual preference.

11. Classification Board - Within ten (10) working days of entering the Prison, all sentenced admittees shall go before the Classification Board in order to determine their job placement. All non-sentenced admittees shall go before the Board within three (3) calendar weeks. The Board shall consist of the following: The Social Work Supervisor

as chairperson, a ranking correctional officer, and a representative from the Prison Education and Training Division. The Social Work Supervisor shall convene meetings of the Classification Board at least once a week.

12. Basis for Work Assignments - Work assignments in the Philadelphia prisons will be based on the skills, education, expected length of stay, and results of tests taken by residents, as well as considerations of institutional security and discipline, consistent with paragraph 70, Stipulation and Agreement II.

13. Work Reclassification - A resident may be reclassified at his/her own request; or that of his or her supervisor, if he/she is not performing adequately on the job for a period of two (2) weeks, following a warning by the supervisor that she/he is not performing adequately on the job.

14. Education and Vocational Training - All admittees shall be made aware at their initial Social Service interview of all educational and vocational programs, and shall have the opportunity to apply for admittance to such programs upon three (3) weeks of residence.

Searches

15. The following paragraphs shall govern all searches of inmates' living quarters, and shall replace provisions of paragraph 12 to 15, inclusive, of Stipulation and Agreement II of October 31, 1978, wherever the two shall conflict.

16. Searches of inmates' living quarters shall be conducted only to find contraband and not to harass or punish an inmate. Any search of an inmate's living quarters shall be documented by a written report submitted by the officer conducting the search.

17. During searches of living quarters, staff will take care to prevent damage or destruction, particularly to personal items and legal materials, and when finished, shall leave the living quarters as close to the condition they were in prior to the search as possible under the circumstances.

18. When any property is seized or damaged during a search, a report must be filed with the Warden within twenty-four (24) hours and a copy given to the inmate.

19. During a search of living quarters, the inmate will be permitted to observe the search from a reasonable distance (except as noted in paragraphs 21 and 22 below).

20. If an inmate is on the grounds or in a work detail, he will be considered to be in the institution and must be present when his cell is being searched. Inmates shall be permitted to observe all searches of their cells except that should an inmate attempt to disrupt the search of his cell or remove anything from his cell during the search, that inmate may be moved from the area of the search and the search may be conducted without the inmate's presence, in a manner consistent with paragraph 21, below.

21. If an inmate is at court or otherwise off the grounds during a search, his cell may be searched without the inmate being present. In the absence of the inmate who is assigned to the cell, a block representative shall be permitted to observe the search consistent with paragraph 20, above.

22. If a search is ordered as the result of information that drugs or weapons are present, the search may be conducted immediately, without concern for the inmate being present; provided, however, that if the inmate is present he may observe the search from a reasonable distance consistent with paragraph 20, above. If any emergency situation arises

which can be only declared by the Warden or, in the absence of the Warden, his designated representative, all searches may be conducted without the consent and/or presence of the inmate. The definition of an emergency situation is as follows:

(a) where there is an immediate threat to life or of serious bodily injury;

(b) riot;

(c) major block disturbance;

(d) escape and/or breakout; or

(e) information reliably received by the Warden or his representative that any of the above-named situations is in imminent danger of occurrence.

23. When a resident leaves the secured area of the Prisons for,or arrives at the Prisons from, an appearance in Court, another penal institution, a hospital visit, or any other place, he or she may be subject to a personal strip search. Such a personal strip search shall be conducted in such a way as to preserve the dignity and integrity of the inmate. Such a strip search may include a visual inspection of all cavity areas.

24. Pursuant to paragraph 23 above, a manual examination of cavity areas may be conducted only where there is reasonable cause to believe the inmate is secreting contraband in those areas. All such manual searches shall be conducted only by a medically trained health employee in a manner designed to assure the greatest possible level of privacy and dignity to the inmate. A report concerning the reasons, circumstances, and results of such a manual search shall be given to the inmate within forty-eight (48) hours of the search.

Grievance System

25. By September 1, 1980, the defendants shall provide to counsel for the plaintiffs and to the Court suggested rules and procedures concerning the mediation of inmate grievances, including those of an individual as well as a policy nature.

26. An inmate may lodge a grievance about:

(a) the circumstance or application of any written or unwritten policy, regulation, or rule of the institution, including its programs;

(b) the lack of a policy, regulation, or rule;

(c) any behavior or action directed toward an inmate;

(d) any provision of the Stipulations and Agreements of the parties, or any Order of the Court in this case.

Specifically excluded are actions of a Disciplinary Board, and issues that are clearly under litigation.

27. The grievance rules and procedures shall incorporate the principles contained in the following paragraphs, 28 to 44.

28. The purpose of the grievance procedures is to assure that inmate complaints are given full opportunity for fair hearing, consideration, and resolution, and they shall supplement, not replace, informal methods of dispute resolution at lower levels.

29. The Deputy Warden shall first seek to have the parties involved come to an informal resolution of the issue. If an informal resolution is achieved, its substance shall be stated on the Inmate Grievance Form and signed by the inmate. Copies shall be given to the inmate and kept on file at the Warden's Office. No copies shall be filed with the inmate's permanent records.

30. Grievance Committees shall be established at each institution, and shall be composed of:

(a) one inmate member chosen by the Block Representatives Council of the institution;

(b) one correctional officer;

(c) a member of the Prisons training staff.

31. Inmates may submit a grievance via a grievance box centrally located at each institution, including a separate box at the Women's Division; via a social worker or correctional officer; or directly to a member of the Grievance Committee.

32. All grievances shall be processed, that is, referred back to the inmate or a hearing held within three (3) working days by the Grievance Committee, to determine whether:

(a) The grievance is solely concerned with a question of policy, in which

case it shall be referred back to the inmate for direct appeal to the Superintendent or his Deputy, or to the Grievance Appeals Panel, as he/she may elect;

(b) The grievance is of an individual nature, in which case the Grievance Committee shall consider it in proceedings described at paragraph 35, infra;

(c) The grievance is without substance or not within the jurisdiction of the Grievance System, in which case it shall be returned to the inmate with such a notation; or

(d) the grievance encompasses both policy issue(s) and an individual grievance, in which case the latter grievance shall be considered by the Grievance Committee and the policy issue(s) shall be referred back to the inmate for submission to the Grievance Appeals Panel or directly to the Superintendent.

33. The Grievance Committee may recommend to the Warden adjustment of the matter as it deems appropriate.

34. A decision on an individual grievance shall be rendered within three (3) working days of a hearing by the Grievance Committee.

35. A hearing by the Grievance Committee shall be conducted in as informal a manner as possible, and the Committee shall call all necessary witnesses as well as directly question the inmate-grievant and the respondent, before rendering a decision.

36. If the findings of the Inmate Grievance Committee have included any recommended action to be taken by the institution, such findings shall be forwarded to the institutional warden for his approval. If the warden approves the findings, he shall sign the Findings of Inmate Grievance Committee Form to this effect and forward a signed copy to the inmate within five (5) working days of the hearing. A copy shall be kept on file in the Warden's Office and with the Deputy Superintendent. If the warden shall deny the recommended action, he shall also indicate this denial on the Findings of Inmate Grievance Committee Form and forward a copy of this denial to the inmate within

five (5) working days of the inmate hearing. The inmate shall have the right of appeal. A copy of this denial shall be kept in the Warden's Office and the Deputy Superintendent's Office.

37. The inmate-grievant may appeal an unfavorable decision of the Grievance Committee or the Warden to the Grievance Appeals Panel, which shall consist of three (3) voting members.

38. The Grievance Appeals Panel shall be convened at least twice monthly, and more frequently if necessary under the circumstances of a particular case or cases.

39. The Convenor of the Grievance Appeals Panel shall be a person not employed by the Prisons, appointed by the Court with the consent of the parties.

40. The Convenor shall be a voting participant in hearings of the Grievance Appeals Panel, and shall have access to all documents and information pertinent to grievance appeals.

41. The three voting members of the Panel shall be as follows:

(a) A correctional officer selected by the Prison Superintendent and the Convenor

from five nominees submitted by the Director of Inmate Services;

(b) The Convenor of the Panel;

(c) A member of a pool of three (3) nominees, one from each of the institutions, selected by that institution's Block Representatives Committee.

42. The Grievance Appeals Panel shall make written findings of fact, and may recommend relief, if appropriate, to the Superintendent or his designee, that shall comform with the Stipulations and Agreements of the parties in this case, and any other rights or privileges established by the rules and regulations of the institution.

43. The Superintendent may reject the recommendations on one or more of the following grounds:

(a) implementation would be contrary to law;

(b) the recommendation is contrary to the rules, regulations, or policies of the institution;

(c) implementation is not fiscally possible;

(d) the recommendation would create a new right of the inmates;

(e) implementation would endanger public and/or institutional security;

(f) the recommendation goes beyond the scope of issues prescribed in the case;

(g) the recommendation is not an appropriate remedy in the specific circumstances of the case; provided, however, that the Superintendent or his designee shall specify the reasons for which the recommendation is not appropriate.

44. In making the decision, the Superintendent shall accept the fact findings of the Grievance Appeals Panel unless said findings are clearly erroneous.

45. The following time frames shall apply for the implementation of the Inmate Grievance System:

(a) By September 12, 1980, the suggested rules and procedures pursuant to paragraphs 25 to 44, above, shall be instituted at Holmesburg Prison;

(b) Thereafter, by December 1, 1980, the Inmate Grievance System shall be established at all institutions of the Philadelphia Prisons.

Overcrowding

46. Paragraph 13 of the Stipulation and Agreement of February 4, 1977 shall be replaced by the provisions set forth in the following paragraphs, 47 to 49.

47. Defendants shall develop, effective immediately, administrative measures to maintain the population in the three institutions at no greater than the rated levels.

48. If the population exceeds this level, the Court will consider for release the following classes of inmates:

(a) Persons held for trial on misdemeanor offenses;

(b) Persons held in default of $3000 bail or less;

(c) Those persons not included in subparagraphs (a) and (b), but who if released would not pose undue danger to the safety of the community or undue risk of non-appearance at scheduled Court hearings.

49. In considering any person for release, the Court shall first give the District Attorney an opportunity to be heard on whether such release would jeopardize the public safety or welfare, or constitute an undue risk that such person would fail to appear for scheduled Court appearances.

Monthly Reports by Defendants

50. Defendants shall submit to the Master and plaintiffs' counsel a monthly inmate population report, which shall include total numbers of:

(a) persons in the prisons;

(b) male residents;

(c) female residents;

(d) juveniles;

(e) persons on work release;

(f) hospital in-patients;

(g) sub-acute care patients;

(h) community-based residents.

Quarterly Reports by Defendants

51. On a quarterly basis defendants shall submit to plaintiffs' counsel and the Master the following written reports for each correctional facility:

(a) a list by name and program of all inmates enrolled in a vocational training or educational program, or working in a paid position in the institution;

(b) the number of correctional officers, social service staff, medical and nursing personnel, and mental health personnel;

(c) all Philadelphia Department of Public Health inspection reports.

Visiting Hours and Facilities

52. The contact visiting room at Holmesburg Prison will open, with adequate staff and furnishings, by May 15, 1980.

53. Effective on that date, contact visits in all three (3) institutions will take place from 9:30 a.m. to 3:15 p.m. on weekdays and from 9:30 a.m. to 10:30 a.m. and 12:15 to 3:15 p.m. on Saturday, Sunday and holidays.

54. Adequate furnishings will be provided for the visiting rooms at the Detention Center and House of Correction by October 1, 1980.

Living Environment

55. The roof at I Block, Holmesburg Prison shall be repaired by roofing experts by July 31, 1980. Within sixty (60) days thereafter, defendants shall submit a plan for completion of repairs on the roof at Holmesburg Prison.

56. The new roof on the rotunda at the House of Correction shall be completed by July 31, 1980.

57. New windows for all living areas at the House of Correction shall be installed by January 31, 1981.

Confiscation of Property

58. Defendants shall log all property taken from detainees on admission to the institution and shall provide a method with which to identify and, where appropriate, return such property. The procedure for identification of such property shall include provision of a receipt to the detainee describing the property seized and the circumstances under which and by whom it was taken. Where appropriate, procedures shall be specified by which a relative or other person designated by the inmate may remove such property from the institution during the inmate's term of incarceration.

59. The procedure outlined in paragraph 58 above shall apply when any detainee's property, other than controlled substances, guns, knives, or other weapons, is taken by defendants at any time other than on admission.

Environmental Health

60. Defendants shall take all necessary measures, consistent with detainees' health and safety, to eliminate vermin and insect infestation within the institution and on the grounds adjacent thereto. For the purpose of this stipulation, infestation shall not be considered to mean the random or occasional presence of an insubstantial number of vermin and insects.

61. Defendants shall retain the full-time services of an environmental health officer, and with the assistance of all necessary and properly trained correctional, civilian, or inmate personnel, shall:

(a) conduct continuous inspections for the detection of any evidence of vermin and insects anywhere within the institution or on the grounds adjacent to the institution, and shall canvass inmates to determine any particular problems of infestation noted by them;

(b) at the first indication of the presence of vermin or insects, defendants shall take appropriate measures to control such vermin or insects;

(c) report in writing to the warden the results of such inspections and all measures taken to prevent or eradicate vermin and insect infestation; such reports shall be available to plaintiffs' counsel upon request;

(d) ke proper precautions in use of all insecticides, rodenticides, traps and other materials for the control of vermin and insects, to prevent food contamination, fire hazard or injury or illness to inmates.

Respectfully submitted,

DAVID RUDOVSKY

JOHN BECK

DONALD BRONSTEIN
Attorneys for Plaintiffs

TAMA MYERS CLARK,
Deputy Solicitor for
Human Services Division

PAULINE COHEN
Assistant Solicitor,
Chief of Health Unit,
Attorneys for Defendants

EDWARD A. AGUILAR,
Master

Approved:

THEODORE B. SMITH, JR., Judge

PAUL A. DANDRIDGE, Judge

CALVIN T. WILSON, Judge

GERALD JACKSON, et al Plaintiffs	:	COURT OF COMMON PLEAS TRIAL DIVISION
v.	:	FEBRUARY TERM, 1971 NO. 2437
EDWARD J. HENDRICK, et al Defendants	:	COMPLAINT IN EQUITY (CLASS ACTION)

STIPULATION AND AGREEMENT IV

TO THE HONORABLE THEODORE B. SMITH, JR., THE HONORABLE PAUL A. DANDRIDGE, THE HONORABLE CALVIN T. WILSON, JUDGES OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY:

AND NOW, the 20th day of October 1981, the parties to this action, by their undersigned attorneys, hereby stipulate and agree as follows:

Jurisdiction of the Court

1. The Court shall retain jurisdiction of the parties and the cause of action.

2. The parties hereto agree that the provisions of this Stipulation and Agreement shall have the full force and effect of a final Order of this Court and that any violation of this Stipulation and Agreement shall subject the violating parties to contempt of Court proceedings.

Visiting

3. Each resident shall be permitted two (2) visits per week, at all institutions of the County Prisons.

4. Two (2) adults and two (2) children shall be permitted at each visit.

5. Night visiting shall be instituted five evenings per week, at Holmesburg Prison on February 1, 1982, and at the House of Correction on March 1, 1982; at the Detention Center night visiting shall begin on September 1, 1982, for those housed in excess of one month.

6. All other visiting procedures as provided in Stipulation and Agreement III of May 12, 1980, at paragraphs 52 to 54, shall continue in effect.

Vocational Training and Pre-Release

7. Defendants shall provide vocational training and/o Pre-release placement for 400 inmates by December 1, 1981.

Assignment of Residents for Training

8. The following procedures will be used in assigning residents for vocational training:

(a) Each resident shall be given a form listing available educational and vocational programs, at his or her intake interview;

(b) Upon three (3) weeks of incarceration, the resident shall be eligible for application to these programs;

(c) Persons who request to be in a program and are not otherwise working shall be classified for an appropriate job, educational or training program within ten (10) days of their request;

(d) Sentenced persons requesting work release shall be referred to the Work Release staff;

(e) If a resident is classified for placement in a program not available where he or she is currently housed, Social Services will seek transfer to the appropriate institution, provided he or she meets the classification criteria for the latter institution.

Capital Improvements

9. Repairs to the roofs at the House of Correction and at Holmesburg Prison shall be completed by February 1, 1982.

10. By January 1, 1982 defendants shall provide the Court and plaintiffs' counsel with plans and timetables for the following projects:

(a) Repair of the shower units at the House of Correction and Holmesburg Prison;

(b) Installation of a new shower unit at House of Correction Segregation Unit;

(c) Repair and maintenance of the shower, sink, window, and light units at the Detention Center;

(d) Painting of all housing units at the Detention Center and Holmesburg Prison, pursuant to paragraph 78, Stipulation and Agreement II.

(e) Plans for housing, staff, programs, and services for female inmates.

11. Painting at House of Correction shall commence by November 25, 1981, and shall be completed at a date to be agreed upon by the parties and the Court.

Inmate Wages

12. On July 1, 1981, the wages for inmate jobs previously classified at $.50 per day shall be increased to $.75 per day.

13. The wages for all those inmates classified for jobs at $.75 per day shall be increased to $1.25 per day, on July 1, 1981.

14. On January 1, 1982, the minimum wage for all inmate job classifications shall be increased to $1.00 per day.

Inmate Welfare Fund

15. The parties hereby delete paragraphs 21 through 25 of Stipulation and Agreement II, dated October 31, 1978, and substitute the provisions in paragraphs 16 through 24, infra.

16. All provisions of this Agreement shall in all pertinent areas conform to Philadelphia City Council Ordinance No. 1239, dated August 21, 1957, establishing the Inmate Welfare Fund.

17. The Warden of each institution shall meet with representatives of the Betterment Committee of that institution on a quarterly basis to discuss income, expenditures and disbursements from the Inmate Welfare Fund.

18. The Betterment Committee shall, in the first instance, make determinations as to the expenditure of Inmate Welfare Fund income. Such expenditures shall be made solely in the best interests of the entire inmate population of that institution.

19. The Warden shall approve the determinations of the Betterment Committee unless he shall decide that they are not in the best interests of the inmate population or pose a threat to the stability, security or order of the institution.

20. If the Warden disapproves of the Betterment Committee's determinations, he shall state his reasons in writing and shall submit copies to the Betterment Committee and the Superintendent. The Betterment Committee shall then make substitute determinations for any disapproved expenditures.

21. The procedure outlined in paragraphs 16, 18, 19, and 20 shall continue until the Betterment Committee and the Warden have reached agreement on the expenditure of all funds.

22. The Warden shall notify the Betterment Committee in writing within seven (7) days of the time the items are ordered and again within seven (7) days of the time the items are received by the institution.

23. Except for funds needed to meet expenditure demands, all funds in the Inmate Custodial Fund shall be placed in an interest-bearing account and that interest shall be used for the benefit of all of the inmates.

24. The defendants shall supply the Betterment Committee, counsel for the plaintiffs, and the Court with an annual accounting of the Inmate Welfare Fund. An audit performed by the City Controller will be sufficient to meet the requirements of this paragraph.

Staffing

25. Pursuant to the attached Timetable, Exhibit A, defendants will authorize an additional 112 positions at the Philadelphia Prisons and will fill those positions and all current vacancies from available lists of eligible candidates.

26. Defendants will utilize their best efforts to ensure that sufficient eligible candidates are available to fill position vacancies, within the pertinent rules and regulations of the City Personnel Department and the Civil Service Commissio

27. In Fiscal Year 1983, defendants are anticipating t budget at least an additional thirty (30) positions, including: twenty-five (25) correctional officers; one (1) correctional sergeant; one (1) correctional lieutenant; three (3) food service supervisors, and additional social work staff necessary to maintain the stated ratios as agreed previously by the parties.

Downtown Detention Facility

28. Defendants shall, by December 1, 1981 select a site for a four-hundred (400)-bed downtown detention facility.

29. Subject to City Council approval, defendants shall provide funding for acquisition of the facility in Fiscal Year 1982.

30. Subject to City Council approval, defendants shall provide funding for rehabilitation and occupancy of the four-hundred (400)-bed facility in the Fiscal Year 1983.

Automatic Staffing Increases

31. For the period of November 1,1981 until April 1, 1982, the parties will negotiate a projected population level of Fiscal Year 1983.

32. Based upon this projected population, allowing for a +10% fluctuation, and subject to City Council approval defendants shall budget funds sufficient to maintain the necessary staff, services, and programs at the Philadelphia Prisons for Fiscal Year 1983. The defendants will operate the Prisons at the budgeted level.

33. When an inmate requires a specialty medical clinic visit, such visit will be provided within two weeks. Emergency care will be provided as necessary.

34. Consistent with Civil Service regulations and union contracts, defendants will take disciplinary action against employees who violate any provision of any Court Order in this case.

Respectfully submitted,

DAVID RUDOVSKY, Esquire

DONALD BRONSTEIN, Esquire
Attorneys for Plaintiffs

ALAN J. DAVIS, Esquire
City Solicitor of Philadelphia

TAMAR MYERS CLARK, Esquire
Deputy City Solicitor for
Human Services Division
Attorneys for Defendants

EDWARD A. AGUILAR, Esquire
Prison Master,
Court of Common Pleas
of Philadelphia

Approved:

THEODORE B. SMITH, JR., Judge

PAUL A. DANDRIDGE, Judge

CALVIN T. WILSON, Judge

October 2, 1981
Date Approved

PHILADELPHIA PRISON SYSTEM

JACKSON vs. HENDRICK: STIPULATION AND AGREEMENT IV, OCTOBER, 1981

Staffing Increase and Hiring Timetable

APPENDIX A

Position Title	Currently Authorized	Existing Vacancies To Be Filled	Additional Positions To Be Auth & Filled	Timetable
Clerk Typist II	2	1	1	-Two persons will be hired by Jan. 1.
Electronic Equipment Repairman I	0	0	1	-Examination given on Oct. 5.
Prison Carpenter	2	0	1	-One Person will be hired by Dec. 15
Prison Painter	2	0	2	-Two persons will be hired by Dec. 15.
Semiskilled Laborer	0	0	2	-Two persons will be hired by Jan. 1.
Prison Plumber	2	0	4	-Examination will be announced Oct. 19; -One person will be hired from existing list by Dec. 15.
Trades Helper (Refrigeration)	0	0	1	-Examination will be announced Oct. 19.
Trades Helper (Roofing)	0	0	2	-Two persons will be hired by Jan. 1
Welder	1	0	1	-One person will be hired by Dec. 15.
Prison Plasterer	1	0	1	-Examination will be announced Oct. 19.

Staffing Increase and Hiring Timetable

APPENDIX A

Position Title	Currently Authorized	Existing Vacancies To Be Filled	Additional Positions To Be Auth & Filled	Timetable
Correctional Officer	829	69	59	-Oct. 5: Announcement of exam for new list; -Oct. 19: one class of 20 - 25 to start from old list; -Nov. 16: one cla. of 20 - 25 to s rt from old list; -Nov. 21: examinatio to be given for new list;
Correctional Sgt.	62	6	2	-To be filled as facilities come on line; -All positions will be filled by Jan. 1;
Social Worker I, II	20	10	14	-Five SW I's wil be hired by Nov. 1; -Nineteen SW I's will be hired by Jan. 1;

APPENDIX A

Staffing Increase and Hiring Timetable

Position Title	Currently Authorized	Existing Vacancies To Be Filled	Additional Positions To Be Auth & Filled	Timetable
Recreation Leader I	2	0	2	-Two persons will be hired by Jan 1;
Addiction Rehabilitation Caseworker I	2	0	2	-Two persons will be hired b Dec 1
Addiction Rehabilitation Caseworker II	2	1	1	-Two persons will be hired by Dec. 15;
Cook III	1	0	2	-Examinatior will be announced Oct 19;
Prison Cook	16	1	2	-Examinatior will be announced Oct 19;
				-Two pe..sons will be hired by Jan 1;
Youth Counselor I	0	11	11	-On board to replace COs in Registrar's Office;

GERALD JACKSON, et al., : COURT OF COMMON PLEAS
Plaintiffs, : TRIAL DIVISION
: FEBRUARY TERM, 1971
vs. : NO. 2437
EDWARD J. HENDRICK, et al., : COMPLAINT IN EQUITY
Defendants. : (CLASS ACTION)

STIPULATION AND AGREEMENT V

TO THE HONORABLE THEODORE B. SMITH, JR., THE HONORABLE PAUL A. DANDRIDGE, THE HONORABLE EUGENE H. CLARKE, JR., JUDGES OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

AND NOW, the day of December, 1982, the parties to this action, by their undersigned attorneys, hereby stipulate and agree as follows:

1. The Court shall retain jurisdiction of the parties and the cause of action.

2. The parties hereto agree that the provisions of this Stipulation and Agreement shall have the full force and effect of a final Order of this Court and that any violation of this Stipulation and Agreement shall subject the violating parties to contempt of Court proceedings.

PLANS TO INCREASE RATED CAPACITY BY APPROXIMATELY 900 SPACES

3. By February 28, 1983, the modular housing complex for female inmates shall be occupied with a rated capacity of 112.

4. By February 28, 1983, the Outmate Building shall be occupied by female inmates with a rated capacity of 16.

5. By February 15, 1983, the rated capacity of the former infirmary at the Detention Center shall be increased by 25 additional beds.

6. By February 15, 1983, D and E Dorms at the Detention Center will be renovated so as to increase the rated capacity of the Detention Center by forty-five (45) additional bed spaces.

7. By June 15, 1983, the Cannery II will be renovated so that the rated capacity of Cannery II shall be twenty-six (26) bed spaces.

8. By December 1, 1983, Philadelphia Prison inmates shall occupy modular units with a rated capacity of seven-hundred (700) bed spaces as follows:

A. Fifty (50) bed spaces for female inmates.

B. Two Hundred Fifty (250) dormitory-style bed spaces for male inmates.

C. Four Hundred (400) maximum-security bed spaces for male inmates.

9. With the exception of outdoor exercise for an initial

quarantine period not to exceed 72 hours, all inmates housed in the new facilities shall be subject to the same rights, privileges, programs, responsibilities, and services as all other inmates.

SUPPLIES

10. Upon admission, each inmate shall receive a kit consisting of the Inmate Handbook, 2 shirts, 2 pants, 2 sheets, soap, a pillow-case, a blanket, toothpaste, a toothbrush, a towel, and a face cloth.

11. Each inmate shall receive a mattress and pillow upon admission to his/her housing area.

SOCIAL WORK SERVICES

12. By April 1, 1983, Defendants shall assign one (1) Social Worker for every 100 inmates to provide said inmates with social work assistance.

VOCATIONAL TRAINING AND JOBS

13. By May 15, 1983, Defendants will develop a plan to increase vocational training (which will include training in computer technology) and pre-release opportunities for inmates from the current 400 positions to 600 positions.

14. Defendants shall increase the number of prison jobs for inmates according to the timetable attached hereto as Appendix "A".

RECREATION - DETENTION CENTER

15. Effective immediately, Defendants shall classify two (2) additional inmate recreation aides for the Detention

Center. By May 1, 1983, Defendants shall have interviewed eligible candidates for three (3) Recreation Leader I positions in the Philadelphia Prisons.

16. By February 7, 1983, Defendants shall submit a contingency plan in the event that no willing eligible candidate is available for employment in these three positions.

VISITING - DETENTION CENTER

17. By July 15, 1983, the visiting area at the Detention Center will be expanded by renovating the room formerly used for non-contact visits.

18. There will be night visiting at the Detention Center two (2) nights per week and at the House of Corrections and Holmesburg five (5) nights per week from the hours of 9:00 a.m. to 9:30 p.m. Visitors will not be registered for an evening visit after 7:30 p.m.

PROCEDURES GOVERNING SEARCHES OF LIVING AREAS

19. By February 15, 1983, Defendants shall implement a new form procedure to monitor the search process.

SEARCH OF VISITORS

20. Visitors to the Philadelphia Prisons shall be subject to search for contraband. Contraband includes drugs and weapons.

21. Searches of visitors shall be conducted in a courteous and dignified manner.

22. Any visitor refusing a search shall be refused admission.

23. Any visitor who has comments about the visiting procedure shall be provided a form for registering his/her comments with the prison administration. By February 1, 1983, the Prison shall provide the forms and procedures for implementing this provision.

ILL INMATES

24. Each inmate confined to the Health Services Wing of the Detention Center shall continue to have the same rights, privileges, and responsibilities as provided all other Philadelphia Prison inmates in Stipulations and Agreements I-V, unless, in the medical judgment of the physicians, the exercise of such rights, privileges and responsibilities would prove detrimental to the physical or mental well-being of the inmate or others.

MEDICAL CLINICS

25. To reduce the backlog of clinic visits by February 15, 1983, the following procedure will be used:

A. On the night before a medical clinic is to be held at the Detention Center, thirty (30) inmates will be brought from the other institutions of the Philadelphia Prisons to C Block of the Detention Center.

B. The inmates will be housed overnight on C Block.

C. The following morning, the inmates housed on C Block will be escorted to their medical clinic visits.

HEALTH SERVICES WING INMATES' ACCESS TO LAW LIBRARY

26. Health Services will furnish the Warden of the Detention Center a list of individuals who, because of medical or psychiatric reasons, are unable to visit the law library.

27. All other inmates on the Health Services Wing shall have equal access to the law library as the inmates in the general population.

28. Defendants shall arrange for a law librar, worker to visit those inmates unable to visit the law library within 48 hours of the inmate's request.

MAINTENANCE

29. By April 1, 1983, renovations will begin on the shower units on F1 and F2 at the House of Correction, and renovations shall be completed by September 30, 1983.

30. By June 1, 1983, Defendants shall have completed all necessary short-term maintenance repairs to showers, toilets and sinks at the Detention Center.

31. By August 31, 1984, long-term renovation of all showers, toilets and sinks at the Detention Center shall be completed.

32. By February 1, 1983, Defendants shall have completed all necessary preparations for installation of telephones in the two law libraries at the House of Correction.

STAFFING

33. By February 15, 1983, Defendants shall develop an

action plan to increase the current number of prison personnel by 111 consistent with the current increase in prison population, and to maintain staffing levels thereafter at the authorized level. Defendants reserve the right to reduce the numbers of prison personnel consistent with a corresponding reduction in inmate population.

34. By April 15, 1983, Defendants shall provide Plaintiffs with projected staffing levels for Fiscal Year 1984.

35. For the period of January 1, 1983 until March 15, 1983, the parties will negotiate a projected population level for Fiscal Year 1984.

36. Based upon this projected population, allowing for a +10% fluctuation, and subject to City Council approval, Defendants shall budget funds sufficient to maintain the necessary staff, services and programs at the Philadelphia Prisons for Fiscal Year 1984. The Defendants will operate prisons at the budgeted level, but reserve the right to reduce the staffing levels, services and programs, in the event of a decrease in inmate population.

KITCHEN WORKERS

37. A ranking officer will be available to ensure that only inmates classified as kitchen workers will work in the kitchen.

DISCIPLINARY PROCEDURES

38. Effective immediately any inmate of the Philadelphia

Prisons may choose any other inmate or Prison employee to represent him/her at a disciplinary hearing.

Respectfully submitted,

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BY:

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Prison Master
Court of Common Pleas
of Philadelphia

APPROVED:

THEODORE B. SMITH, JR., Judge

PAUL A. DANDRIDGE, Judge

EUGENE H. CLARKE, JR., Judge

APPENDIX "A"

INCREASED RATED CAPACITY/INCREASED INMATE JOBS

FACILITY	PROJECTED NUMBER OF JOBS	PROJECTED DATE OF JOBS	TYPE OF JOB
Detention Center (Day rooms D & E)	3	February 15, 1983	Cleaning
Detention Center (Former Infirmary)	2	February 15, 1983	Cleaning
Male Modulars	10	December 31, 1983	Cleaning
" "	5	" "	Food Servic
G Wing	10	February 1, 1983	Cleaning
Cannery II	1	June 15, 1983	Cleaning
Additional Modulars (For Female Inmates)	2	December 31, 1983	Cleaning
Additional Modulars (For Male Inmates)	50		Food Servic Maintenance
TOTAL PROJECTED JOBS	83		

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 1983, a copy of the foregoing Amended Complaint was served on Robert E. Silverman, Esquire, 1500 Municipal Services Building, Philadelphia, Pennsylvania, 19107, counsel of record for defendants, by first-class mail, postage prepaid.

Philip H. Lebowitz

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

SUPREME COURT OF THE UNITED STATES

IRENE PERNSLEY ET AL. *v.* MARTIN HARRIS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–1955. Decided November 4, 1985

The motion of respondents for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is denied.

THE CHIEF JUSTICE, dissenting.

For the past nine years, the prison system in Philadelphia has been operating under the supervision of the Court of Common Pleas of Philadelphia County, following that court's finding in 1972 that prison conditions violated both the Pennsylvania Constitution and the Eighth Amendment of the United States Constitution. Since 1976, a full-time, court-appointed Special Master has been in place and numerous remedial orders have been issued, including orders requiring the building of new prison facilities and contempt orders imposing over $500,000 in fines for failure to comply with prior orders. In addition, the parties have entered into consent decrees aimed at controlling the population in the prison system. Beginning in 1984, the Pennsylvania Supreme Court assumed plenary jurisdiction over the entire State proceeding.

The State suit commenced by the filing of a class action in 1971 on behalf of all inmates in the Philadelphia prisons, seeking equitable relief from alleged unconstitutional prison conditions; defendants are officials of Philadelphia. In the case now before us Respondent, an inmate who admits he is a member of the same class represented in the State action, brought a separate class action in the Eastern District of Pennsylvania on behalf of all persons confined in the Philadelphia prisons; defendants include City and State officials. The federal complaint similarly makes claims like those in the

3 pp

State suit, and asserts that the Philadelphia prisons are overcrowded, thereby violating the Eighth Amendment of the United States Constitution; it seeks extensive injunctive relief and monetary damages under 42 U. S. C. § 1983.

The District Court dismissed the equitable relief claims sought in this second class action on the alternative grounds of *res judicata*, or abstention under the doctrine of *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976); it dismissed the damage claim on grounds of sovereign and qualified official immunity. A divided Court of Appeals for the Third Circuit reversed, rejecting each of the District Court's holdings. 755 F. 2d 338. In his dissenting opinion, Judge Garth agreed that while *Colorado River* did not support abstention, *Younger* v. *Harris*, 401 U. S. 37 (1971), mandated it:

> I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been, and presently are, exercising supervision over these institutions and are doing so in accordance with both state and federal constitutional requirements. 755 F. 2d, at 347.

Rehearing was denied over two dissents. 758 F. 2d 83.

Respondents essentially ask the federal courts to duplicate the on-going State court regulation of the Philadelphia prison system. The District Court recognized that the substantial and ongoing State court proceedings involve an important State interest, namely, the administration of a prison system. The Court of Appeals nevertheless found *Younger* abstention restricted to pending State criminal or quasi-criminal proceedings initiated by the State. Our cases, however, recognize that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U. S. 423, 432 (1982). See also *Moore* v. *Sims*, 442 U. S. 415, 423

(1979) (the *Younger* doctrine is "fully applicable to civil proceedings in which important state interests are involved").

The *Younger* doctrine is rooted in the concept of comity, because

> interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 604 (1975).

There is no question that the State is a party to the ongoing State proceedings and that important State policies are implicated in the management of the county prison system. The State courts continue to exercise comprehensive jurisdiction over the prison system's administration through use of a Special Master, by holding hearings, and by issuing remedial orders and ordering fines. Should the District Court exercise its equitable powers as sought in this second suit, the Philadelphia prisons may thus become subject to potentially conflicting and contrary determinations as to the appropriate remedy for the alleged unconstitutional conditions. Although plaintiffs here additionally seek damages, there is no bar to the assertion of that claim in the State proceedings. So long as plaintiffs have an opportunity to raise their federal claims in the State action, "[n]o more is required to invoke *Younger* abstention." *Juidice* v. *Vail*, 430 U. S. 327, 337 (1977).

I would grant the writ of certiorari and reverse the Court of Appeals judgment.

JUSTICE REHNQUIST and JUSTICE O'CONNOR would grant certiorari.